No. _____ ./

In The Supreme Court of the United States

**ALLEGHENY INTERMEDIATE UNIT;
BARBARA MINZENBERG, Program Director,**

Petitioners,

v.

**DAVID AND JENNIFER PARDINI,
on behalf of themselves and on behalf of
their minor child, GEORGIA PARDINI,**

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

Under the Individuals With Disabilities in Education Act, a child at the age of three, is required to transition from a Part C birth to three medically based program to a Part B ages three to twenty-one educational program. If a dispute arises during the transition process, which program is the stay-put placement?

Can attorney-parents of disabled children collect attorney's fees as a prevailing party?

LIST OF PARTIES

The Petitioner is the Allegheny Intermediate Unit, a body politic organized and operating under the Pennsylvania Public School Code of 1949, as amended responsible for the provision of IDEA-Part B services for three to five year old children with disabilities in Allegheny County, Pennsylvania.

The respondents are David Pardini and Jennifer Pardini, appearing in their own right and as parents and next friends of their daughter, Georgia Pardini.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner th. .llegheny Intermediate Unit, a body politic organized and existing pursuant to the Pennsylvania School Code of 1949, as amended, respectfully prays for a writ of certiorari to review the judgment of the Court of Appeals, which ruled that pendency exists during transitions from an IDEA Part C medical program to an IDEA Part B educational program and remanded the case for a determination of monetary reimbursement and attorney's fees.

OPINIONS BELOW

There are five opinions below, culminating in the Court of Appeals ruling that is the subject of this petition. In chronological order they are as follows:

Two separate administrative due process proceedings were initiated in June of 2003. Respondents requested an independent evaluation at public expense which was the subject of a first-tier administrative due process hearing. An additional due process hearing was requested by Respondents to dispute the appropriateness of the Individualized Educational Program (hereinafter referred to as "IEP") offered by the Petitioner. Both of these matters, at Due Process Hearing File No. 2517/02-03 and Due Process Hearing File No. 2455/02-03, were assigned to Administrative Hearing Officer Dr. Dennis Fair. On June 19, 2003, Dr. Fair issued an order that the Individual Family Service Plan (hereinafter referred to as "IFSP") was not the pendent placement. As of September 29, 2003, both due process hearings were withdrawn and discontinued at the

request of Respondents.[1] The Administrative Hearing Officer's orders are reproduced at Appendix 49a, 50a, and 56a. The written request to discontinue is reproduced at Appendix 57a.

Respondents filed for a Temporary Restraining Order and Preliminary Injunction while involved in the administrative due process hearings. In the U.S. District Court for the Western District of Pennsylvania, the District Court denied the Temporary Restraining Order on May 30, 2003. In August of 2003, the District Court held an evidentiary hearing on Respondents' request for a permanent injunction. The District Court denied the request for injunctive relief and held that pendency did not apply to children transitioning from Part C to Part B of the IDEA. The decision of the United States District Court for the Western District of Pennsylvania has been reported at 280 F. Supp. 2d 447. It is reproduced at Appendix 26a.

The Court of Appeals for the Third Circuit reversed the District Court, holding that pendency did apply during periods of transition from Part C to Part B programs and remanded the case for a determination of reimbursement and award of attorney's fees to the attorney parent. This decision, which is the subject of the petition, has been published at 420 F. 3d 181. It is reproduced at Appendix 1a.

An unpublished denial of rehearing *en banc* is reprinted at Appendix 47a.

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[1] The issue of failure to exhaust was raised by Petitioner at both the District Court and Court of Appeals. The Court of Appeals failed to address this issue in its decision.

JURISDICTION

The panel decision of the Court of Appeals was entered on August 29, 2005. The decision of the Court of Appeals denying the petition for rehearing *en banc* was entered on October 5, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The issue involving the application of stay-put arises under the procedural safeguard provisions of the Individuals With Disabilities in Education Act ("IDEA") 20 U.S.C. § 1415 (Part B) and 20 U.S.C. § 1439 (Part C). IDEA provides that a prevailing party may recover an award of attorney's fees at 20 U.S.C. § 1415(d)(4)(B). IDEA is silent on whether an attorney parent is able to recover attorney's fees. These statutory provisions are reprinted at Appendix 62a, 99a, and 83a.

STATEMENT OF THE CASE

This action arose out of an endeavor by the Respondents, David and Jennifer Pardini (hereinafter referred to as "Pardinis") to enjoin the Allegheny Intermediate Unit (hereinafter referred to as the "AIU") to provide a specific methodology, previously provided by the Pennsylvania Department of Public Welfare but unrecognized by the Pennsylvania Department of Education, to their daughter, Georgia Pardini, who has cerebral palsy, while the parties were involved in the Individuals With Disabilities in Education Act (hereinafter referred to as "IDEA") dispute resolution process.

This dispute arose during the transition process from Part C services under the IDEA to Part B. The new agency responsible for offering the Part B services was the AIU. Georgia, whose date of birth is April 18, 2000, qualified for

special education and related services in the form of an IEP on her third birthday. Prior to her third birthday, Georgia received services from the Pennsylvania Department of Public Welfare pursuant to an IFSP. The IFSP as of December 2002 was Georgia's current placement under the IDEA Part C birth to three program. Services terminated upon her third birthday, as she no longer qualified for services under Part C, the birth to three program of IDEA.

Part C Services

Part C is a medical model and offers a program of medically based practices centering on the needs of the family rather then the individual student. Under the birth to three program, an Individualized Family Service Plan (IFSP) is family centered, focusing on the needs of the family to help the child. 20 U.S.C. § 1431, 20 U.S.C. § 1435(a)(3). An IFSP as a medical model, which requires a 25% delay in one or more developmental areas to be eligible, whereas an IEP is an educational model, which requires a 25% delay in a developmental area AND a need for specially designed instruction. 20 U.S.C. § 1432(1), 20 U.S.C. § 1432(5), 20 U.S.C. § 1401(3)(emphasis added). The fundamental goal of Part C is to provide support to improve a family's capacity to meet the needs of the child. Part C provides developmental services to a child in conformity with an IFSP. 20 U.S.C. § 1432(4).

The focus of the Part B three to five program is to allow the child to participate in appropriate preschool activities with nondisabled peers to the maximum extent appropriate. IDEA mandates that each participating state shall ensure that the obligation to make a free appropriate public education (hereinafter referred to as "FAPE") available to each eligible child residing in the state begins no later than the child's third birthday and an IEP or IFSP is in effect for the child by that date. 34 C.F.R. § 300.1221(c).

When a child reaches the age of three, states are required to develop policies and procedures to facilitate the smooth transition from an IFSP to an IEP. 20 U.S.C. § 1413(a)(15). This smooth transition does not require that the new agency provide the exact same program of services. The policies and procedures are to ensure that the new agency will provide notice to the family of the need to evaluate for eligibility, the change in the model of services, and the change in the provider agency. The purpose of these procedures is to ensure timely access to services. Smooth transition does not equate to the exact same provision of services. A child is only entitled to receive such services as are required to assist the child to benefit from special education rather than services to assist the family.

Part B Services

Part B services refer to a program of services offered to children ages three to twenty-one through an IEP. Part B operates as an educational model of services, which focuses on a child's disability, and need for services to access the educational environment. An initial evaluation for educational services under Part B of IDEA must determine whether the child is a child with a disability and the educational needs of the child. 34 C.F. R. § 300.320(a)(1),(2).

Part B of the IDEA requires that States provide a FAPE to eligible children with disabilities beginning at age three to age twenty-one. 20 U.S.C. § 1412; 34 C.F.R. Part 300. FAPE is defined as special education and related services that meet state standards, are provided in conformity with an IEP, at public expense, under public supervision and direction, without charge, and include an appropriate preschool, elementary, or secondary school education. 20 U.S.C. § 1401(8). An IEP is centered and responsive to the needs of the individual child. 20 U.S.C. § 1414(d)(1)(A). An appropriate IEP is one that meets the procedural and

regulatory requirements and is one that is designed to provide meaningful educational benefit to the child. Hendrick Hudson Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982).

Stay-Put

States are not required to continue the IFSP when a child reaches the age of three, the transition year. An IFSP may serve as the IEP if it is (i) consistent with state policy and (ii) agreed to by the agency and the child's parents. 34 C.F.R. § 300.342(c)(1). IFSPs may serve as the IEP if the agency and parents both agree. 34 C.F.R. § 300.342(c)(1). Additionally, the IDEA recognizes that the IEP will not contain the same components as the IFSP because the mandated transition process is to include procedures to help the child for changes in service delivery, including steps to adjust to and function in a new setting. 34 C.F.R. § 303.344(h).

The stay-put provision of the IDEA provides that the **appropriate** early intervention services currently provided shall continue or if applying for the **initial** services, the child shall receive the services not in dispute. 20 U.S.C. § 1439(b) (emphasis added). At issue in this case was the transition process of applying for initial services under Part B of the IDEA. The Office of Special Education Programs (OSEP) has analyzed 34 C.F.R. § 300.513 and has concluded that under this regulation the applicable stay-put placement for a three-year old child is the "proposed public school program". In this case, the "proposed public school program" is the interim IEP. In Pennsylvania, the public school program is the program operated by the AIU on behalf of the local school districts. Under § 300.513, if a dispute arises about a child's initial placement in the public school program, the stay-put is the public school program

and not the birth to three services. Letter to Klebanoff, 28 IDELR 478, (January 23, 1997.)

There is no requirement upon an educational agency to implement the IFSP created under a medical model. Reading of the plain language of 20 U.S.C. § 1439(b) reveals that, the transfer of Georgia from the medically derived IFSP to an educational program clearly is an initiation of educational services. The AIU's IEP is the pendent placement. 20 U.S.C. § 1439(b), 20 U S.C. § 1415(j).

At issue in this case is the transition period from the birth to three program, Part C, to services under Part B of the IDEA. This transition involves a number of changes, one of which is the change in responsible agency. "When responsibility transfers from one public agency to another, the new public agency is required only to provide a program that is in conformity with the placement in the last agreed upon IEP or IFSP." Johnson v. Special Education Hearing Office, 287 F.3d 1176, (9th Cir. 2002). "The new agency need not, and probably could not, provide the exact same educational program." Id.

During transition from Part C to Part B there is a clear demarcation of programs and a clear direction by the statute that enrolling in Part B is to be considered initial enrollment in the public schools. Part C and Part B have within each part their own separate stay-put language. The Part C language specifically provides "During the pendency of any proceeding or action involving a complaint by the parents of an infant or toddler with a disability, unless the State agency and the parents otherwise agree, the infant or toddler shall continue to receive the appropriate early intervention services currently being provided or, if applying for initial services, shall receive the services not in dispute." 20 U.S.C. § 1439(b). This language, while similar in its mandate to maintain the status quo, also provides for

situations in which the infant is first enrolling in the program. Pursuant to 20 U.S.C. § 1439, an infant first enrolling in the Part C program would only be entitled to receive the services not in dispute during the dispute resolution proceedings. Part B provides a similar provision, which clearly states that upon initial enrollment, the pendent placement is the program offered by the public school. A student transitioning from a Part C birth to three program must meet eligibility requirements to receive Part B three to five services. This is not automatic and incorporates a different standard of eligibility than the birth to three program. The Congressional findings clearly provide the distinction between the two programs. Congress found that "to reduce the educational costs to our society, including our Nation's schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age." 20 U.S.C. § 1431(a)(2). Additionally, the Congressional findings provide direction that the drafters of IDEA believed the programs to be separate and that the 0-3 program's focus was not on education but on minimizing the likelihood of infants and toddlers with disabilities from requiring special education. It is not until a child is determined eligible for Part B services that special education and related services are provided. Pursuant to Part C a child receives early intervention services designed to meet the developmental needs rather than special education and related services. 20 U.S.C. § 1432(4). Missing from Part C is the language concerning FAPE. A child is only entitled to FAPE when he/she reaches school age, three to twenty-one. Nowhere within the Part C statutes or regulations is the term "education" used. Clearly, an IFSP is not an educational program. So, it cannot be considered the "current educational placement" for purposes of the stay-put provision of Part B.

District Court Decision (Appendix 26a)

The District Court found in the Petitioner's favor, holding that an IFSP provided by the Part C agency was not a "continuing educational placement" for purposes of the stay-put provision of the IDEA during the period of transition. Additionally, the District Court held that the Respondents had not exhausted their administrative remedies.

The Court of Appeals Decision (Appendix 1a)

The Panel suggests that denial of the injunction was improper because an IFSP is an educational placement. The Panel reasoned that because the writers did not use the terminology of IEP, the language "current educational placement" should be read broadly to encompass a non-educational program such as an IFSP. As support, the Panel relied upon language from a Sixth Circuit case, which defined "current educational placement" as the "operative placement under which the child is actually receiving instruction at the time the dispute arises." Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625-626 (6th Cir. 1990). The Thomas case involved a situation wherein an IEP had not been in operation at the time. This reliance upon the Thomas case fails to anticipate that the reason the drafters of IDEA did not refer to an IEP in the stay-put language of Part B is that there will be situations wherein the safeguard of stay-put is raised where the child will remain in the regular education environment during dispute resolution.

The conclusion that the stay-put provision of IDEA Part B applies to situations wherein a child is first enrolling in the public school system conflicts with the holdings of the 3rd Circuit in Drinker v. Colonial School District, 78 F. 3d 859 (3d Cir. 1996). In Drinker, the court specifically directed that the dispositive factor in deciding a child's "then current

educational placement" for purposes of stay-put should be the IEP actually functioning when "stay-put" is invoked. Id. at 867. Additionally, the court stated that "implicit in the maintenance of the status quo is the requirement that a school district finance an educational placement made by the agency and consented to by the parent before the request for due process." Id. at 865. The AIU had proffered an IEP at Georgia's initial enrollment. The placement made by the agency-AIU was this IEP. It is this IEP that was the operative program functioning because Georgia was no longer eligible for the birth to three program.

In Drinker, the Third Circuit Court distinguished an OSEP Policy Letter, Letter to Spindler, 18 IDELR 1038 (1992), by finding that the important issues of timing and transition to a new educational placement were not addressed. The court characterized Section 1415(e)(3)(Part B stay-put)'s core concern as the timing and transition to a new educational placement. Drinker, at 866.

At issue in the case sub judice is the timing and transition from a non-educational placement to an educational program. Interestingly, while OSEP's, Letter to Klebanoff, 28 IDELR 478 (1997), is directly on point and addressed the very issue before the Panel the Panel did not distinguish the opinion but merely refused to follow it as not well reasoned. (Reproduced at Appendix 58a).

In Letter to Klebanoff, the agency was asked to identify the stay-put placement for a child who was transitioning from Part C to Part B. OSEP stated that its regulations did not require an agency responsible for the provision of FAPE to maintain a child in a program developed for a two-year old during the pendency of proceedings over the appropriate educational services for the child under Part B. This opinion is clearly supported by language and structure of the IDEA, whereas the Panel's

opinion conflicts with prior precedent, as well as the language of the statute.

In its Order, the Court of Appeals remanded the case for a determination of a fee award to Petitioner, who is an attorney-parent. The Third Circuit fails to address that this is in direct conflict with a prior decision directly on point, but addresses the issue in a footnote relying upon the Third Circuit decision of Zucker v. Westinghouse, 374 F.3d 221, 227 (3d Cir. 2004). Oddly, Zucker holds that a pro se attorney is not entitled to reimbursement for his own fees in a shareholder's derivative lawsuit. Id. (emphasis added). Additionally, if the Third Circuit's application of stay-put is held to be correct, Part C does not provide for an award of prevailing party fees. Part C is completely silent as to this type of remedy. Mr. Pardini, is a licensed Pennsylvania attorney, who represented his daughter in this action. The Third Circuit states that the Pardinis "are entitled to reimbursement of the out-of-pocket expenses resulting from the AIU's failure to comply with 20 U.S.C. §1415(j) as well as reasonable attorney's fees." The Court continued that Mr. Pardini is not precluded from recovering his own attorney's fees under the IDEA merely because he is seeking reimbursement for his own expenses while representing his daughter. The order for remand on award of attorney's fees is in direct conflict with prior decisions of the Third Circuit and the Fourth Circuit.

Following the panel decision, the Court of Appeals denied a petition for rehearing *en banc*. Appendix 47a.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case blurs the line of demarcation established by the drafters of IDEA between Part C, the medical IFSP, and Part B, the educational IEP. There are two reasons why this petition should be granted. First, there is a split among

Third, Ninth, and Eleventh Circuits on the application of stay-put during the transition period of Part C to Part B. Additionally, there is a conflict among the Third and Fourth Circuit Courts of Appeals as to whether attorney parents can receive prevailing party fee awards. These splits among the circuit courts comply with Sup. Ct. Rule 10(a). Second, the issues are of substantial importance implicating the need for uniform application of the IDEA.

A. CONFLICT IN THE CIRCUIT COURTS

1. Pendency

Johnson v. Special Education Hearing Office, 287 F.3d 1176 (9th Cir. 2002).

A California Circuit Court held that an educational agency was not required under the stay-put provision of IDEA to provide a child with the exact same program he had received under his IFSP when transitioning to an IEP. The Ninth Circuit reasoned that this stage of transition involved a number of changes, one of which is the change in responsible agency. "When responsibility transfers from one public agency to another, the new public agency is required only to provide a program this is in conformity with the placement in the last agreed upon IEP or IFSP." Johnson v. Special Education Hearing Office, 287 F.3d 1176, (9th Cir. 2002). "The new agency need not, and probably could not, provide the exact same educational program." Id.

Broward County Sch. Bd., 4 ECLRP 569 (SEA FL 2004), D.P. and L.P. on behalf of E.P., D.P., and K.P. v. School Board of Broward County, Florida, 360 F. Supp. 2d 1294 (March 8, 2005).

A Florida Administrative Law Judge held that a district was not required to provide interim IFSP services to 3-year old triplets with autism pursuant to the IDEA's stay-put provision. The ALJ held that under the IDEA, Parts B and C have differing focuses. Therefore, IFSP services do not equate to a current educational placement. The ALJ relied upon OSEP Letter to Klebanoff that concluded that for stay-put purposes, IFSP services were not a current educational placement. The ALJ observed that Part C was designed to focus on the student and the family, whereas Part B was solely to focus on the student as an individual. It was this difference in focus that prevented the stay-put application to the transition between IFSP to an IEP. The decision of the ALJ was appealed to the United States District Court in Southern District of Florida. The District Court held that children transitioning from Part C to Part B of the IDEA were not entitled to continuation of early intervention services provided to them in their IFSP. This case is reported at D.P. and L.P. on behalf of E.P., D.P., and K.P. v. School Board of Broward County, Florida, 360 F. Supp. 2d 1294 (S.D. Fla. 2005).

2. Attorney's Fees

The court of appeals decision to allow reimbursement to an attorney parent who represents his own child in an IDEA matter is, in direct conflict with a prior Third Circuit decision that is directly on point. In Woodside v. The School District of Philadelphia Board of Education, 248 F.3d 129 (3d Cir. 2001), the Third Circuit unequivocally held as a matter of first impression that an attorney parent who successfully represents his own child under the IDEA may not recover reasonable attorney's fees under the IDEA's fee shifting provision.[2] The Third Circuit court in Woodside relied upon Doe v. Board of Education of

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[2] Judge McKee, who authored the Pardini opinion, was a member of the panel of Circuit Judges in Woodside.

Baltimore County, 165 F.3d 260 (4th Cir. 1998), cert. denied, 526 U.S. 1159 (1999), in which a panel of the Fourth Circuit "answered the question in the negative in a case factually similar." Woodside, 248 F.3d at 130-131. "The Doe Court based its holding on the reasoning of a Supreme Court opinion in which a unanimous Court held that a pro se plaintiff who is an attorney cannot be awarded attorney fees under the fee shifting provision of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988(b), which contains language very similar to the IDEA fee-shifting provision." Id. at 131. The Court concluded, "Because we agree with the Supreme Court's reasoning in Kay and the Fourth Circuit's conclusion in Doe, we join the Fourth Circuit in holding that an attorney-parent cannot receive attorney fees for work representing his minor child in proceedings under the IDEA." Id. The decision that is the matter of this petition directly conflicts with its prior holdings and that of the Fourth Circuit. Further, Zucker v. Westinghouse, 374 F.3d 221, which was cited by the Third Circuit in support of its position that the Pardinis were entitled to reimbursement for his own fees, actually relies upon the cases cited above to hold that a pro se attorney is not entitled to reimbursement for his own fees in a shareholder's derivative lawsuit. (emphasis added).

B. IMPORTANT ISSUES THAT SHOULD BE ADDRESSED

The need for certiorari is underscored by the need for uniform application of the IDEA. There is a need for a uniform rule on the issue of pendency between transitions from Part C to Part B. Congress specifically differentiated between the services to be provided to children from birth to the age of three under Part C of the IDEA and services to be provided to school age children under Part B of the IDEA. The position adopted by the Third Circuit conflicts with the statutory mandates of a Part B agency to provide

educational services by licensed and properly certificated individuals. The Part C program does not have these same restrictions as recognized by the Ninth Circuit in Johnson. As discussed earlier, the purpose of Part C services is to decrease the need for special education referrals to Part B programs. The current position of the Third Circuit has the potential to create situations wherein a child's IFSP is held to be continued past its eligibility point of age three by an educational entity during dispute resolution. Educational entities whose mandate is to provide a FAPE would be in the conflicting position of providing non-educational services pursuant to IFSPs created under differing eligibility and professional standards.

Uniform application as to whether attorney parents are entitled to prevailing party fee awards is needed. Certiorari should be granted.

CONCLUSION

For all the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[ENTERED: AUGUST 29, 2005]

No: 03-2897/3988

DAVID AND JENNIFER PARDINI, on
behalf of themselves and on behalf of
their minor child, GEORGIA PARDINI,

Appellants

ALLEGHENY INTERMEDIATE UNIT;
BARBARA MINZENBERG, Program Director

On Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. Civil No. 03-cv-00725
District Judge: Arthur J. Schwab

Argued: November 12, 2004

Before: McKee, Chertoff[1], Circuit Judges and Buckwalter[2],
Senior District Judge

(Filed August 29, 2005)

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1 Judge Chertoff heard oral argument in this case but resigned before the time the opinion was filed. The opinion is filed by a quorum of the panel. 28 U.S.C. § 46(d).

2 Honorable Ronald L. Buckwalter, United States District Judge for the Eastern District of Pennsylvania, sitting by designation

OPINION

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McKee, Circuit Judge.

David and Jennifer Pardini brought this action on behalf of their minor daughter, "Georgia." They are appealing the District Court's ruling that she was not

entitled to continue to receive certain educational/ developmental services pursuant to the "stay-put" provision of the Individuals with Disabilities in Education Act, until the dispute over those services is resolved. For the reasons that follow, we will reverse.

I. Factual Background

Georgia Pardini was born on April 18, 2000. She has cerebral palsy, a condition that affects muscular coordination and body movement. Sometime after her first birthday, Georgia began receiving services from the Alliance for Infants and Toddlers ("AIT") in the form of an Individualized Family Service Plan ("IFSP") pursuant to the Individuals With Disabilities in Education Act, 20 U.S.C. §§ 1400-85, ("IDEA" or the "Act"). Shortly before Georgia's third birthday, as she was about to transition out of her IFSP, a dispute arose about whether the Individualized Education Program ("IEP") being developed for her by the Allegheny Intermediate Unit ("AIU") should include the conductive education Georgia had been receiving as part of her IFSP.[3]

The AIU had evaluated Georgia as part of the normal transition from an IFSP to an IEP that is mandated by the IDEA when a child turns three. The District Court found that the Pardinis received the evaluation on March 15, 2003 along with instructions telling them to "Read the report, sign the original, and return in the enclosed envelope within 5 days [and] [i]f you disagree with any part of the report, write a statement on a separate piece of paper that describes the items with which you disagree."

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[3] Conductive education is an educational approach for children with central nervous system disabilities. It is a holistic approach to help develop problem-solving skills.

The Pardinis and agents of AIU met on March 24,2003, but the Pardinis refused to sign the IEP because it did not provide for the conductive education Georgia had been receiving under the IFSP. Rather than sign, the Pardinis requested an independent evaluation and asked AIU to continue all of the services Georgia had been receiving pending the outcome of that evaluation. AIU responded by advising the Pardinis that it would instead seek a due process hearing pursuant to 20 U.S.C. § 1415(f) "to prove the appropriateness of their evaluation and thus, deny the public expense of the independent evaluation." *Pardini v. Allegheny Intermediate Unit*, 280 F.Supp.2d 447, 450. (W.D. Pa. 2003). The Pardinis reiterated their request that conductive education continue as Georgia's "current educational placement" in a letter dated March 25, 2003. Although AIU subsequently sent the Pardinis at least two letters, one of which was dated March 31, 2003, and the other of which was dated April 15, 2003, a second IEP meeting scheduled for April 17 was postponed because the Pardinis did not receive adequate notice. When the Pardinis thereafter demanded a written explanation of the services that would be discontinued on Georgia's third birthday, AIU responded by asserting its intent to request a due process hearing. AIU also informed the family that it would not continue the conductive education during the due process proceedings and that feature of her IFSP would be discontinued as of Georgia's third birthday.

At the May 1, 2003 IEP meeting, AIU presented a Notice of Recommended Educational Placement ("NOREP") that included only those services it deemed appropriate; it did not include conductive education. The Pardinis signed noting their objection to the absence of conductive education. The District Court summarized that meeting and AIU's refusal to subsequently provide Georgia with any services as follows: "Plaintiffs attended [the] . . . meeting . . . under protest . . . . AIU refused to offer Plaintiffs a NOREP

that included all of the IFSP related services and Plaintiffs signed their objection to AIU's NOREP as such. Nevertheless, the AIU has not restarted Georgia's IDEA services." *Pardini*, 280 F. Supp. 2d at 453.

The AIU and the Pardinis could not agree upon Georgia's IEP, and the Pardinis refused to sign a NOREP that did not include conductive education. The AIU took the position that it could not provide any services under the circumstances, and it terminated all of Georgia's services four days after her third birthday. The Pardinis responded in a letter to AIU in which they objected to AIU's actions and demanded that Georgia's services be reinstated pursuant to the "stay-put" requirement of 20 U.S.C. § 1415(j). The AIU maintained that § 1415(j) did not apply because Georgia was transitioning from an IFSP to an IEP. "The Pardinis reasonably believe[d] that conductive education, . . . has proven . . . effective and . . . beneficial to Georgia. [ ] AIU . . .refused to even consider the appropriateness and effectiveness of conductive education . . . as part of its proposed IEP, prior to presenting that IEP to the parents." *Pardini*, 230 F. Supp. 2d. at 454.

While the due process hearings were proceeding to determine whether "a meaningful and appropriate IEP should include . . . conductive education . . . or whether the alternatives offered by AIU [were] adequate to insure [Georgia's] meaningful progress," *id.*, the Pardinis filed the instant action in the District Court.[4] The Hearing Officer

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[4] At oral argument, the parties informed the court that the Pardinis eventually agreed to an IEP that did not include conductive education. However, since we conclude that Georgia was entitled to receive conductive education as a part of Georgia's IEP until the dispute was resolved, they are entitled to reimbursement of the out-of-pocket expense resulting from the AIU's failure to comply with 20 U.S.C. § 1415(j) as well as reasonable attorneys' fees.

We do not think that Mr. Pardini is precluded from recovering reasonable attorneys' fees otherwise provided for under the IDEA merely

did not specifically address the application of the stay-put rule. Rather, he relied upon the District Court's conclusion that "Georgia's IFSP is not pendent," because she had reached her third birthday, and proceeded to address the issue of "whether the parents should receive an [Independent Educational Evaluation] at public expense." App. 656. Thereafter, the District Court entered a final order ruling that § 1415(j) did not require the IEP to offer conductive education during the pendency of the administrative hearings.[5] This appeal followed.

Meanwhile, the state conducted due process hearings on June 10 and June 12, 2003 to determine if AIU was obligated to continue providing the services Georgia had received as part of her IFSP pending the resolution of the disputed IEP, as well as whether the proposed IEP was appropriate. Ultimately, the Dispute Resolution Hearing Officer ruled that AIU was not obligated to continue all of Georgia's services under the IFSP. The hearing was then continued to determine whether the Pardinis should receive an independent evaluation.

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because he is seeking reimbursement for his own expenses while representing his daughter. In *Zucker v. Westinghouse*, 374 F.3d 221, 227 (3d. Cir. 2004) we recognized that, absent an expression of congressional intent to the contrary, a plaintiffs entitlement to attorneys' fees is not eliminated merely because he/she was *pro se* counsel. Although we were there discussing the right of a *pro se* plaintiff in a shareholder's derivative action, that conclusion is not limited to that specific type of action. Since Mr. Pardini requested "such other relief as the Court deems fitting and proper," in his complaint, he is entitled to recover reasonable attorneys' fees to the extent that he is the prevailing party.

5 The District Court noted the ongoing administrative proceedings but concluded "in light of the somewhat inexplicable communication problems and institutional stubbornness exhibited by AIU . . . that the Pardinis face a bewildering bureaucratic nightmare [that] must be particularly daunting to young parents who are financially strapped and emotionally pressed to provide for the special... needs of their child." *Pardini*, 280 F. Supp. 2d at 454.

On August 29, 2003, after conducting a trial, the District Court issued a second opinion in which the court ruled that the Pardinis were not entitled to any relief. The court reasoned that the stay-put provision of the IDEA did not require AIU to provide the identical educational program that AIT had been providing under Georgia's IFSP because the AIT was a different program with a different funding stream. The court also concluded that the respective agency, not the parents, had the ultimate responsibility for deciding upon an appropriate educational program for Georgia. This appeal followed.[6]

II. Discussion

The District Court concluded that the stay-put rule of § 1415(j) does not apply to a child who has reached her third birthday and is therefore transitioning from an IFSP to an IEP. The court explained, "[a]n IFSP is a medical model, . . . [whereas] [a]n IEP is an educational model. *Pardini*, 280 F. Supp. 2d at 454. The court reasoned that, since Georgia was embarking upon her first IEP and a public education, the "applicable stay-put placement... is the proposed public school placement and program" contained in the IEP that did not include conductive education. *Id.* Accordingly, the court reasoned that the AIU was not obligated to provide for conductive education pending the outcome of the due process hearings.

In order to properly resolve this dispute, we must examine the IDEA to determine if Congress intended that disputed features of an IFSP be provided under an IEP that

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[6] Since the termination of Georgia's services, the Pardinis have paid for two sessions of conductive education services. They have also paid for Georgia to receive services at the Euromed Rehabilitation Center in Mielno, Poland, as well as services through United Cerebral Palsy/North Coast Ohio Conductive Education of Cleveland, and the Ronald McDonald House of Cleveland.

is offered upon a child reaching the age of three and transitioning from one part of the Act to another.

A. Statutory Background.

In enacting the IDEA, Congress originally only provided for children with disabilities who were between the ages 5 and 21. However, in 1986, Congress amended the ACT to extend to disabled children who were between three and five years of age. Accordingly, 20 U.S.C. § 1412 declares that a state is only eligible for financial assistance when "a free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21 . . . ."

The program providing services to children beyond their third birthday ("school-aged children") is referred to as "Part B," and the program providing services to children between the ages of three and five is known as the "Part B Preschool Program." Part B defines a "free appropriate public education" as:

> [S]pecial education and related services that:
>
> a. have been provided at public expense, under public supervision and direction, and without charge;
> b. meet the standards of the State educational agency;
> c. include an appropriate preschool, elementary, or secondary school education in the State involved; and
> d. are provided in conformity with the individualized education program . . ."

20 U.S.C. § 1401(8).

The IEP is a written statement prepared as the result of consultation among a representative of the local educational agency, the teacher, and the parents, which must contain," statements of: present levels and performance, annual goals and objectives, "specific educational services to be provided[ ] . . ., the extent to which such child will be able to participate in regular educational programs, [ ] the projected date for initiation and anticipated duration of such services, and . . . appropriate evaluation procedures and schedules for determining, . . . whether instructional objectives are being achieved.[7]

Thomas v. Cincinnati Bd. of Educ, 918 F.2d 618, 621 (6th Cir. 1990). 20 U.S.C. § 1401(19).[8]

The issue before us involves the Act's provisions for the child during the pendency of disputes involving the child's program or placement. At the outset, we referred to 20 U.S.C. § 1415(j) which provides in pertinent part as follows:

> D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the

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[7] Under the IDEA, parents of "disabled" children have the right to examine relevant records pertaining to the child. They are also meaningful participants in the evaluative process and they have a right to an independent educational evaluation of the child if they disagree with the services the school or educational agency offers. Parents are also entitled to advance notice whenever the school or agency refuses to initiate or change the identification, evaluation or educational placement of the child. 20 U.S.C. § 1415(b).

[8] *Thomas* involved the Education for all Handicapped Children Act, Pub. L. No. 94-142, 1975 U.S.C.C.A.N. (89 Stat.) 773, 789, the predecessor to IDEA. *See Michael C. v. Radnor, Township School Dist.*, 202 F.3d 642, 652 n. 9 (3rd. Cir. 2000).

> parents . . . otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents . . . be placed in the public school program until all such proceedings have been completed.

This "stay-put provision dates back to 1975, when it was enacted as § 615(e)(3) of the IDEA'S predecessor statute, the Education for All Handicapped Children Act. *Michael C. v. Radnor, Township School Dist.*, 202 F.3d 642, 652, n9 (3rd. Cir. 2000).

In 1986, Congress amended the IDEA by adding the "Part C" Program to serve children from birth to age three. 20 U.S.C. § § 1431-1445. Part C requires states that receive funds under the statute to provide "appropriate early intervention services as set forth in an Individualized Family Service Plan ("IFSP"). Section 1432(4) of the IDEA defines "early intervention services" as "developmental services" that "are designed to meet the developmental needs of an infant or toddler with a disability." This involves the child's physical, cognitive, communication, social or emotional, and/or adaptive development. *Id.*

Congress realized that it was important to allow for an overlap of services rather than legislate a rigid and artificial demarcation inconsistent with the reality of early development because "[e]arly intervention research indicated that certain types of services required by infants and toddlers with disabilities are comparable to . . . services required by preschoolers with disabilities that are included in their individualized family service plans." H.R. Rep. at 7.

In enacting the amendments to the IDEA, Congress stressed that the transition from Part C to Part B upon a

child's third birthday was to be "*a. smooth transition.*" *See* 20 U.S.C. § 1412(a)(9). Congress mandated that "[c]hildren participating in early-intervention programs . . . under [Part C], and who will participate in preschool programs [under Part B], experience a smooth and effective transition to those preschool programs in a manner consistent with section 1437(a)(8) of this title. By the third birthday, . . . an individualized education program or, if consistent with sections 1414(d)(2)(B) and 1436(d) . . . an individualized family service plan, has been developed and implemented. . . . The referenced section 1437(a)(8), sets forth certain requirements that states applying for funds under the Act must include in their application. Congress required that such states include a "description of the policies and procedures [ ] to ensure a smooth transition. Similarly, the referenced section 1414(d)(2)(B) specifically states that "an individualized family service plan . . . may serve as the IEP" when appropriate.

Moreover, Congress has clearly recognized that realities dictate that there must often be significant overlap in services provided under Part C and Part B. Thus, Part C funds can be used from the child's third birthday to the beginning of the following school year. 20 U.S.C. § 1438(3). Conversely, a state can use Part B funds to provide services to a child who is not yet eligible for preschool early intervention services and therefore would not ordinarily qualify for funding under Part B. In addition, federal regulations explain that states shall comply with the requirement of providing a free, appropriate pubic education ("FRAPE") by ensuring that an IEP *or* an IFSP is in effect for the child beginning at age three. 34 C.F.R. § 300.121(c)(1)(ii). Therefore, we think it is clear that an IFSP under Part C can serve as a child's Preschool IEP under the Part B if the agency and the parents both agree. 20 U.S.C. §§ 1414(d)(2)(A) and (B), 34 C.F.R. § 300.342(c)(1).

Thus, in Pennsylvania, the Early Intervention Services System Act ("Act 212") mandates appropriate special education programs for disabled children from birth to age five. 11 Pa. Cons. Stat. Ann. § § 875-101 et. seq. (Purdon 2002). Under that act, the Pennsylvania Department of Education is responsible for providing services to disabled preschool children aged 3 to 5 as well as school aged children. The Department of Public Welfare is responsible for providing services to children from birth to age three.

The instant dispute over Georgia's conductive education is rooted in this administrative demarcation. The Department of Public Welfare recognizes conductive education. The Pennsylvania Department of Education does not recognize it.

B. The Application of the Stay-Put Rule to Georgia's Transition.

The Pardinis claim that the congressional concern for a smooth transition to preschool and services under Part B of the IDEA can best be accomplished through a program that includes conductive education. Moreover, since Georgia had been receiving conductive education as part of her IFSP, they claim that it was part of the "current educational placement." However, the AIU argues that Georgia's IEP should not merely mirror the services she was receiving under her IFSP because the IDEA recognizes a developmental, and educational change in focus when a child becomes three and begins preparing for school. The AIU states: "Stay-put does not apply to the initiation of services from Part C to Part B of the IDEA. The programs operate under different agencies, different eligibility requirements, and different purposes. To argue that they are the same is preposterous." Appellee's Br. at 10.

Of course, the issue here is not whether Part C and Part B are the same; they clearly are not. Rather, the issue is whether § 1415(j) required the AIU to include conductive education as part of Georgia's initial IEP until the agency and the parents could resolve their dispute over her IEP. That is a very different question.

In resolving that inquiry against the Pardinis, the District Court relied largely on *Johnson v. Special Education Hearing Office*, 287 F.3d 1176 (9th Cir. 2002). There, parents sought an administrative hearing to challenge an IEP that provided for a change in the vendor that had offered a particular service under their son's IEP. The services that were contemplated by the education agency were identical to those that had been offered under their son's IFSP before his third birthday. The agency claimed that the vendor could not continue to provide services after a child's third birthday, but the agency proposed offering the same services with a different vendor.

In the due process hearings that followed, the Hearing Officer ordered continuation of the placement and services, but concluded the school district" 'need not utilize the same vendors who provided services under that IFSP.'" *Id.*, at 1179.

The parents responded by seeking an injunctive order in the District Court requiring the Hearing Officer to "issue a new 'stay put' order [forcing the school district] to use the same tutors, vendors, and supervisory services [as those in their son's IFSP]." *Id.* The District Court analyzed the dispute using the customary criteria for resolving claims for injunctive relief. That included an analysis of irreparable harm, and the likelihood of success on the merits. *Id.* Based upon that analysis, the court denied the request for injunctive relief, and the Court of Appeals affirmed citing

Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 (6th Cir. 1990).

Here, the District Court concluded that since "Plaintiffs are in the transition process applying for initial services under Part B[ ]," [t]he applicable stay-put placement for a three-year old child is the proposed public school placement and program." *Pardini*, 280 F. Supp. 2d at. 455. Quoting from *Johnson*, the District Court also held, "[w]hen responsibility transfers from one public agency to another, 'the new agency is required only to provide a program that is in conformity with the placement in the last agreed upon IEP or IFSP. The new agency need not. . . provide the exact same educational program..'" (internal citation omitted).

We do not disagree with the reasoning in *Johnson*. However, we believe the District Court misapplied that decision. The parties in *Johnson* stipulated that the child's IFSP constituted "his current educational placement for 'stay put' purposes." 287 F.3d. at 1180, The parties were only disputing whether the identical services had to be provided by the same vendor who had provided them under the IFSP. Thus, to the extent that it applies to our analysis at all, *Johnson* undermines the District Court's focus on the distinction between the developmental needs of children who are less than three, and the educational needs of children who are older than three. The services offered under the IEP in *Johnson* were identical to those that had been offered under the IFSP.

The District Court cited *Johnson* in stating: "[w]hen responsibility transfers from one public agency to another, . .. 'the new agency need not, and probably could not, provide the exact same educational program.'" 280 F. Supp. 3d at 456. (quoting *Johnson*, 287 F.3d at 1181). However, since *Johnson* did not involve the child's entitlement to disputed services during the pendency of a dispute, the case

is distinguishable from the circumstances before us. It is important to remember that Congress was concerned with the services and programs offered to handicapped children, not with the vendors supplying them. The District Court's failure to recognize that distinction undermines its reliance on *Thompson*.

Moreover, the District Court's error was compounded (or perhaps facilitated) by its reliance upon an analysis more appropriately utilized for ruling upon preliminary injunctions than enforcing the Act's stay-put rule. The court reasoned "that Plaintiffs would not be irreparably harmed by refusal to grant the injunction, and that the public interest would be served by permitting the . . . proceedings to continue, which would develop a full and meaningful record if further review became necessary." 289 F. Supp. 2d at 452. However, Congress has already balanced the competing harms as well as the competing equities. In *Drinker v. Colonial School Dist.*, 78 F.3d. 859, 864 (3d Cir. 1996), we explained that the Act "substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a . . . balance of hardships."

Although, as we have noted, the court in *Johnson* also engaged in a traditional preliminary injunction analysis, that analysis did not involve the stay-put rule. Rather, the Hearing Officer in *Johnson* had already entered a "stay-put order" under the Act and the parents were asking a court to enjoin *that order*, not the proposed IEP. The court explained: "Here, the Hearing Officer's 'stay-put' order preserves the tutors, goals, and plan . . . it only changes the plan supervisors. . . . Thus, the 'stay put* order correctly determined [the child's] 'then current educational placement' and [the plaintiffs have] very little likelihood of success in challenging the 'stay put' order." 287 F.3d at 1182

(internal quotes in original). Moreover, "because the [agency] offered comparable placement [to the child] no irreparable harm would befall [him] by denying the preliminary injunction." *Id.* Here, of course, there is no "stay-put order" in place and the Pardinis are arguing that the program the AIU is proposing is not comparable to the program Georgia had been receiving under the IFSP. Therefore, *Johnson* does not support the District Court's holding. Moreover, we cannot reconcile the District Court's analysis with our decision in *Drinker, supra,* or our the Supreme Court's decision in *Honig v. Doe,* 484 U.S. 305 (1988).

In *Honig,* the Supreme Court rejected school authorities' claim that, under the circumstances there, proposed changes to a child's educational placement must remain in effect until the propriety of the placement was ultimately determined. The Court observed, "[t]he language of § 1415(e)(3)[9] is unequivocal. It states plainly that during the pendency of any proceedings under the Act, unless the state or local educational agency and the parents agree . . . , 'the child *shall* remain in the then current educational placement.'" *Id.,* at 323 (emphasis in original). The facts in *Honig* dramatically underscore the impact and importance of the Court's ruling.

Honig involved two students whose individual cases were consolidated. Both students had engaged in disability-related misconduct. One student had forcefully choked a classmate and then kicked out a school window while being escorted to the principal's office. *Id.,* at 313. In both cases, the parents filed suit under the predecessor of the IDEA in an effort to enjoin the school district from expelling their children until appropriate placements and IEPs were agreed

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[9] 20 U.S.C. § 1415(e)(3) is the forerunner to 20 U.S.C. 1415(f), and the two provisions are identical.

upon. Except for the district's authority to impose a very brief suspension, the District Court enjoined the school district from unilaterally acting against "any disabled child for disability-related misconduct, or from effecting any other change in the educational placement . . . without parental consent pending completion of [due process] proceedings." *Id.*, at 315. The Court of Appeals affirmed but modified the District Court's order to allow for fixed suspensions of up to 30 school days. The court reasoned that the school district retained the authority to take such limited action under the stay-put rule and certain provisions of the state's Education Code.

On appeal, the school district asked the Supreme Court to read a "'dangerousness' exception into the stay-put provision[.]" The Court refused. The Court did not accept the school's argument that Congress obviously intended for schools to retain "residual authority to . . . exclude dangerous students from the classroom[.]" *Id,* at 323. The Court did not think it obvious that Congress intended schools or educational agencies to have any such power. Rather, the Court thought it "clear[ ] . . . that Congress very much intended to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, . . . from school." *Id.*, at 323 (emphasis in original).[10] The Court thus concluded that the stay-put provision "means what it says." *Id.*, at 324.

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[10] Given this clear statutory authority, the District Court's belief in the primacy of the educational agency is somewhat puzzling. The court stated: "[t]he responsibility for choosing the educational method most suitable to the child's needs is left to the educational agency." 280 F. Supp. 2d at 454. To the extent that this suggests a marginalized or diminished role for the parents, the court's assessment of the respective roles is erroneous. It is clear that the parents are not to be excluded from the decision, and the "responsibility" for the decision does not solely rest with the educators or an educational agency. Rather, "Congress repeatedly emphasized throughout the Act *the importance and indeed the necessity* of parental participation in both the development of the IEP and any

Nor are we convinced by AIU's claim that, since this was Georgia's initial IEP, it constituted the "current educational placement" for purposes of the stay-put rule. In *Drinker*, we stressed the importance of maintaining the *status quo* when identifying "the then current educational placement" for purposes of the stay-put rule. 78 F.3d at 864. We stated:

> [I]mplicit in the maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent before the . . . due process [procedure is invoked]. To cut off public funds would amount to a unilateral change in placement, prohibited by the Act.

Id. (brackets in original) (quoting *Zvi D. v Ambach*, 694 F.2d 904, 906 (2d. Cir. 1982).

We are also not persuaded by AIU's claim that the demarcation between Part C and Part B of the IDEA, and the administrative and fiscal division of the providers of services offered under those respective programs, counsels against viewing the IFSP as the "current educational placement" under the circumstances of this dispute. This distinction simply can not negate the explicit language of the stay-put provision, Congress's concern for the child's "smooth transition," the Supreme Court's analysis in *Honig* or our decision in *Drinker*. Rather, we think it clear that

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subsequent assessments of its effectiveness." *Honig*, 484 U.S. at 598 (emphasis added). Although the Court was there referring to an IEP, parental involvement in an IFSP is no less important under the Act. "[T]he Act establishes various . . . safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate. "*Id.*, 312-3.

"[t]he [stay-put] provision represents Congress' policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved." *Drinker*, at 865.

Our conclusion is not altered by the fact that Part C programs are deemed "developmental" and part B programs are deemed "educational." As we explained in *Drinker*:

> Because the [current educational placement] connotes preservation of the status quo, it refers to the operative placement actually functioning at the time the dispute first arises. If an IEP has been implemented, then that program's placement will be the one subject to the stay put provision. And where ... the dispute arises before any IEP has been implemented, the current educational placement will be the operative placement under which the child is actually receiving instruction at the time the dispute arises.

Drinker, at 867 (quoting *Thomas v. Cincinnati Bd. Of Educ.*, 918 F.2d 618, 625-26 (6th Cir. 1990)) (internal quotation marks omitted). Here, it is beyond dispute that Georgia was receiving an IFSP that included conductive education when the dispute arose. That was the "operative placement actually functioning [when this dispute arose." Georgia was therefore entitled to continue to receive that service as a component of her IEP until the dispute was resolved following her third birthday.

> Had Congress intended a prospective IEP to govern the Act's stay put provision, as opposed to an operational placement, it could have employed the term "individualized

> educational program" which it had already defined. Since it did not, the term "then current educational placement" must be accorded, its plain meaning. Because the term connotes preservation of the status quo, it refers to the operative placement actually functioning at the time the dispute first arises. . . . where, as here, the dispute arises before any IEP has been implemented, the "current educational placement" will be the operative placement under which the child is actually receiving instruction at the time the dispute arises

Thomas 918 F.2d at 625-26.

In addition, 20 U.S.C. §1415(j) must be read in context with the rest of the IDEA statute. It is a fundamental rule of statutory construction that a statute's provisions should be read to be consistent with one another. *United Steelworkers of America v. North Star,* 5 F.3d. 39, 43 (3d Cir., 1993). Instead of noting the differences between the Part B and Part C programs, we must remember that Congress sought to ensure continuity in the education of each under the IDEA. Yet, the AIU's attempt to chisel distinct barriers between services provided under Parts C and B based upon its theory of childhood development would require us to ignore the programmatic and fiscal overlap between Part C and Part B as well as the congressional mandate of a smooth transition between the two. Congress stressed that the amendments it added were "designed to promote a *seamless* system of services for children with disabilities, aged birth to five, inclusive." H.R. Rep. No. 198, 102nd Cong., 1st Sess. 1991, WL 185659, at 7.

Congress has clearly recognized that needs of disabled children do not fit neatly into the age-defined

stages suggested by the AIU. Although Georgia was technically transitioning within the administrative and fiscal structure of IDEA'S statutory scheme, her needs did not magically change on her third birthday. She still needed substantially the same services she was receiving in the days preceding her birthday. Indeed, 20 U.S.C. § 1412(a)(9) describes the transition to the preschool programs and notes that either an IEP or an IFSP may be used and implemented for the child. The Act expressly states that an IFSP may be used if it is "consistent with State policy," and "agreed to by the agency and the child's parents." Thus, the IDEA both anticipates and condones the possible interchangeability of an IFSP and IEP during transition to preschool.

Furthermore, even if we could accept the AIU's theory of "development" vs. "education," we would still be convinced that by the analysis in the cases we have discussed, that the conductive education in Georgia's IFSP was part of the status quo that should have been maintained pending resolution of the dispute over her IEP.

OSEP's Letter to Klebanoff[11]

The District Court also relied upon on OSEP's *Letter to Klebanoff*. "[T]he level of deference to be accorded such interpretive rules depends upon their persuasiveness." *Michael C. V. The Radnor Township School Dist.*, 202 F.3d 642, 649. In evaluating persuasiveness we consider such factors as the thoroughness, reasoning, and consistency with other agency pronouncements. *Chester County Intermediate Unit v. Pennsylvania Blue Shield*, 896 F.2d 808, 815 (3d. Cir. 1990).

In *Letter to Klebanoff*, the OSEP answered an inquiry regarding whether the stay-put provision mandated the

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11 "OSEP" refers to the Office of Special Education Programs of the U.S. Department of Education.

continuation of services a three-year old received in the Birth to Three-Year old program when the parents did not agree to the school's proposed education program. OSEP responded to the inquiry by stating it did not interpret 34 C.F.R. § 300.513 as requiring a public agency responsible for providing FAPE . . . to maintain [the] child in a program developed for a two-year old child as a means of providing that child and . . . [h]er family appropriate early intervention services under Part H." 28 IDELR 478.[12] However, the OSEP never explained how it reached that conclusion. Moreover, we find the discussion in *Thomas v. Cincinnati Bd. of Ed.* much more helpful. We agree that the plain meaning of "current educational placement" refers to the "operative placement actually functioning at the time the dispute first arises." 918 F.2d 618 at 625-626 (6th Cir. 1990).

In *Thomas,* an IEP was developed for a severely retarded eleven year old child, but before the services were to begin, doubts about funding caused the school to review the plan. The Court of Appeals held that the IEP could not be the "current educational placement" because it had never been implemented. Likewise, here, the proposed IEP had not been implemented when the dispute over whether it should contain conductive education arose. Rather, Georgia's operative placement consisted of the services she was receiving under her IFSP.

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12 "Part H of the IDEA requires states to provide 'appropriate early intervention services to all infants and toddlers with disabilities and their families.' The statute defines 'infants and toddlers with disabilities' as 'individuals from birth to age 2, inclusive. Similarly, states must provide 'a free appropriate public education' to disabled individuals between the ages of three and twenty-one years old to be eligible to receive federal funds under part B of the IDEA." *Still v. DeBuono,* 101 F.3d 888, 891 (2d. Cir. 1996) (citations omitted). Although Part H and Part B "are distinct in notable respects, their basic structure and purpose are strikingly similar . . . ." *id.,* at 892, Part B establishes an IEP, and part H establishes an IFSP. .

III. Conclusion

For the reasons set forth above, we hold that the stay-put provision of the IDEA, 20 U.S.C. § 1415(j), required Georgia to continue to receive conductive education until the dispute over its appropriateness for inclusion in her IEP was resolved. Accordingly, the Pardinis are entitled to the cost of the conductive education that they purchased before the dispute was resolved by their agreement to an IEP that did not contain it. We will therefore reverse the decision of the District Court and remand for the court to determine the amount of reimbursement the Pardinis are entitled to as well as the amount of any attorneys fees.[13]

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[13] The District Court reached the merits of the Pardinis' complaint without requiring exhaustion of administrative remedies under the IDEA because of the "bewildering bureaucratic nightmare," they had faced in dealing with the AIU. 280 F. Supp. 2d at 454. We assume that the court was concluding that exhaustion would be futile and that failure to exhaust was therefore excused; *See W.B. v. Manila*, 67 F.3d 484, 495-96 (3d. Cir. 1995). On appeal, the AIU argues that the reimbursement remedy the Pardinis are seeking "is an available administrative remedy in an administrative proceeding," and urges us to deny relief because an administrative remedy is available. Appellee's Br. at 16.

However, the issue here - the interpretation of § 1415(j) - is a purely legal one. "Courts require exhaustion where the peculiar expertise of an administrative hearing officer is necessary to develop a factual record. . . . Where the factual record is fully-developed and no evidentiary disputes remain, the court can and should decide legal issues. *Octavia P. v. Gilhool*, 916 F.2d 865, 869 (3d. Cir. 1990) (citations omitted).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[ENTERED: AUGUST 29, 2005]

No: 03-2897/3988

DAVID AND JENNIFER PARDINI, on behalf of themselves and on behalf of their minor child, GEORGIA PARDINI,

Appellants

ALLEGHENY INTERMEDIATE UNIT;
BARBARA MINZENBERG, Program Director

On Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. Civil No. 03-cv-00725
District Judge: Arthur J. Schwab

Before: McKee, Chertoff[1], Circuit Judges and Buckwalter[2], Senior District Judge

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on November 12, 2004.

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1 Judge Chertoff heard oral argument in this case but resigned before the time the opinion was filed. The opinion is filed by quorum of the panel. 28 U.S.C. § 46(d).

2 Honorable Ronald L. Buckwalter, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the order of the said District Court entered August 29, 2003, be, and the same is hereby vacated and the matter is remanded to the District Court for proceedings consistent with this opinion. Costs taxed against appellee. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron
Clerk

Dated: August 29, 2005

Cost taxed in favor of Appellant as follows:

Brief	$181.40
Appendix	$34.82
Reply Brief	$243.80
Docketing Fee	$200.00
Total	$660.02

Certified as a true copy and issued in lieu of a formal mandate on October 13, 2005

Teste: /s/ Marcia M. Waldron
Clerk, U.S. Court of Appeals for the Third Circuit

280 F.Supp.2d 447
181 Ed. Law Rep. 550
(Cite as: 280 F.Supp.2d 447)

United States District Court,
W.D. Pennsylvania.

David and Jennifer PARDINI, on behalf of themselves and on behalf of their minor child, Georgia Pardini, Plaintiff,

v.

ALLEGHENY INTERMEDIATE UNIT and Barbara Minzenberg, Program Director, Defendants.

No. CIV.A. 03-0725.

Aug. 29, 2003.

[ENTERED: AUGUST 29, 2003]

Parents of three-year-old child with cerebral palsy brought action against education agency in charge of transitioning child's individual family service plan (IFSP) to an individualized education plan (IEP) under the Individuals with Disabilities Education Act (IDEA), and moved for an injunction requiring agency to continue to provide certain therapeutic services to child while the parties disputed child's proposed IEP. Agency moved for summary judgment. The District Court, Schwab, J., held that: (1) parents' conclusory allegations were insufficient to demonstrate that pursuit of administrative remedies would be futile or that child would be irreparably harmed by court's refusal to enjoin agency, as required to excuse parents' failure to exhaust administrative remedies prior to bringing action under the IDEA, and (2) IFSP provided by

agency was not a "continuing educational placement," for purposes of the stay- put provision of the IDEA, and thus agency was not compelled to duplicate identical services in its proposed IEP.

Motions denied.

MEMORANDUM OPINION

SCHWAB, District Judge.

I. INTRODUCTION.

On May 30, 2003, this Court denied Plaintiffs David and Jennifer Pardini's motion for preliminary injunctive relief pursuant to the Individuals With Disabilities Education Act, 20 U.S.C. § 1415(i)(2) ("IDEA"). The Pardinis sought to enjoin Defendants, the Allegheny Intermediate Unit ("AIU") and Barbara Minzenberg, AIU's program director, to continue to provide certain therapeutic services to their daughter, Georgia Pardini, who has cerebral palsy, while the parties disputed AIU's proposed Individual Educational Plan ("IEP") to be put into place for Georgia following her third birthday. On August 25, 2003, following a period of discovery and a failed mediation attempt, this Court heard evidence on the Pardinis' request for a permanent injunction and other relief, and argument on Defendants' motion for summary judgment. At that hearing, Plaintiffs agreed with Defendants that Ms. Minzenberg should be dismissed from the case as an individual defendant, and the Court granted Defendants' motion for summary judgment as to Ms. Minzenberg only.

After careful consideration of the evidence adduced at the hearings on the request for a preliminary injunction and for a permanent injunction, the proposed findings of fact and conclusions of law, the briefs in support and in opposition to Plaintiffs' request for injunctive relief, and the

Court's decision of May 30, 2003 rendered on the record (Notes of Testimony ("N.T."), May 30, 2003, Joint Exhibit 3, at 26-37), the Court will deny Plaintiffs' request for injunctive and other relief on the merits, and will deny the remaining portion of Defendants' motion for summary judgment as moot.

II. FINDINGS OF FACT.

The Court makes the following findings of fact from the joint stipulation of the parties as to undisputed facts, and from this Court's resolution of credibility and disputed facts from the evidence and testimony submitted at the hearings.

A. Joint Stipulations.

1. Georgia Pardini was born on April 18, 2000.

2. As of December, 2002, Georgia's Individual Family Service Plan ("EFSP") provided by the Alliance for Infants and Toddlers, Inc. ("AIT") included physical therapy one-hour sessions two times per week, occupational therapy once per week and conductive education one-hour sessions three times per week.

3. On or about February 25, 2003, Georgia was re-evaluated by the AIU in anticipation of her third birthday on April 18, 2003, for transitioning her educational placement and services from the IFSP to an "IEP" (Individual Education Program) as required by the Individuals With Disabilities Education Act, 20 USC § 1400 *et seq.*, ("IDEA"). The Evaluation Report confirmed Georgia's qualification for continued special education placement and related services in the form of an IEP. The IEP was completed on or about March 7, 2003, and received by Plaintiffs on or about March 15, 2003, under an undated cover letter which directed them to "Read the report, sign the original, and return in the enclosed envelope within 5

days [, and] [i]f you disagree with any part of the report, write a statement on a separate sheet of paper that describes the items with which you disagree."

4. The first IEP meeting took place on March 24, 2003, and Plaintiffs refused to sign or agree to the Evaluation Report.

5. Plaintiffs requested an independent evaluation and information as to where to obtain an evaluation which would consider conductive education, and AIU advised Plaintiffs that it would seek a due process hearing, as provided by the IDEA, 20 U.S.C. § 1415(f), to prove the appropriateness of their evaluation and thus, deny the public expense of the independent evaluation.

6. Plaintiffs specifically requested that all of the services (including conductive education) that had been provided by AIT under the IFSP continue as Georgia's "current educational placement" and remain in place pending the resolution of any dispute.

7. Plaintiffs confirmed these requests by letter of March 25, 2003, and further requested the specific authority upon which AIU was relying to selectively terminate the provision of conductive education.

8. On April 16, 2003, Plaintiffs received by Federal Express and facsimile (sent April 15, 2003), copies of AIU's response letters dated March 31, 2003, and April 15, 2003, whereby, *inter alia*, it was agreed that the second IEP meeting scheduled for April 17, 2003, would be rescheduled. IEP meetings were held on March 24, 2003, and May 1, 2003.

9. Plaintiffs demanded a written communication explicitly stating that all of the services under Georgia's current IFSP educational placement, not

just conductive education, would be terminated or discontinued, for whatever reason, as of or after her third birthday on April 18, 2003. AIU responded by facsimile letter stating the following with regard to the status of early intervention services for plaintiffs' daughter:

> 1. You have requested an independent educational evaluation ... [AIU] is obligated to request a due process hearing to defend the appropriateness of our evaluation.
> 2. [AIU] staff members attempted to conduct an IEP meeting on March 24, 2003. However, you and your wife chose not to proceed with that meeting.
> 3. On Georgia's third birthday, the Infant Toddler program is no longer in effect.
> 4. I have offered a series of additional dates, times and locations for an IEP meeting to be held so that you and the [AIU] DART Program can agree on an interim free and appropriate educational program for your daughter.
> 5. We cannot proceed with the provision of services without your permission via a signed Notice of Recommended Educational Placement (NOREP).

10. On April 18, 2003, Georgia turned three years of age and received her usual IFSP services. However, on April 21, 2003, all of Georgia's regularly scheduled services as per her current IFSP education placement, were discontinued or terminated. Plaintiffs responded by letter of that same day confirming the communications of the past week, taking exception with AIU's position and representations, and demanding that the services be reinstated as per the IDEA'S "stay-put rule," 20 U.S.C. § 1415(j), in lieu of the instant civil action.

11. Plaintiff's privately placed their daughter for two (2) sessions of conductive education services, one for

the week of April 21, 2003 and one for the week of April 28, 2003. A copy of the unpaid invoice is attached hereto as Exhibit "A".

12. An IEP meeting occurred on May 1, 2003, resulting in the production of the documents that are Joint Exhibits No. 11 and No. 25.

13. Due process hearings were conducted on June 10, 2003 and June 12, 2003. The purpose of these hearings was to address Plaintiffs' request for Georgia's services provided under the IFSP to continue, or "stay-put," pending the resolution of the disputed IEP, and the appropriateness of providing an independent evaluation at public expense.

14. With respect to the state due process hearings, Office for Dispute Resolution (ODR) Hearing Officer, Dr. Dennis Fair issued two orders on June 19,2003. Joint Exhibit No. 30. Dr. Fair's first order followed this Court's ruling of May 30, 2003, and held that Georgia's IFSP was not "pendant," and therefore the stay-put rule did not require AIU to continue all services provided under the IFSP. His second order continued the due process hearing that had been scheduled to determine whether the Pardinis should receive an independent evaluation at public expense.

15. At the conclusion of the telephone hearing of May 30, 2003 on Plaintiffs' request for a preliminary injunction, the Court ruled on the record (in the interests of expediency), based upon the Joint Stipulation of May 29, 2003 and additional findings, that the Pardinis had not shown a likelihood of success on the merits in that the IFSP did not constitute a "current educational placement" so as to trigger the "stay-put" rule of 20 U.S.C. § 1415(j). The Court reasoned, inter alia, mat if the IFSP was deemed the "current educational placement" under section 1415(j), AIU would

have been required to continue services provided by a different agency, the AIT, pending resolution of the dispute over the proposed IEP. Joint Exhibit 3, N.T. May 30, 2003, at 32-35. The Court also made a finding at that time that the Plaintiffs had not exhausted their administrative remedies under the IDEA. *Id,* at 36. Further, the Court found Plaintiffs would not be irreparably harmed by refusal to grant the injunction, and that the public interest would be served by permitting the due process hearings and administrative proceedings to continue, which would develop a full and meaningful record if further review became necessary. *Id,* at 36-37.

B. Additional Findings- -August 25, 2003 Evidentiary Hearing.

16. When the transition process first began in January 2003, Plaintiffs communicated to AIU that they considered conductive education to be the most beneficial related service that had been provided to Georgia. AIU acknowledged that it had an unwritten policy whereby it did not and would not sanction or approve conductive education as an IEP related service, and that it would only provide the related services it deemed standard.

17. The first IEP meeting occurred on March 24, 2003, at which Plaintiffs refused to sign the Evaluation Report, requested an Independent Evaluation at AIU's expense and requested that all of the IFSP services be continued pending the dispute over AIU's Evaluation Report. AIU indicated all IFSP services, except for conductive education, would continue, to which Plaintiffs requested the authority AIU was relying on to single out conductive education for termination pending the dispute. AIU never presented for discussion, nor asked Plaintiffs to sign, a Notice of Recommended Educational Placement (NOREP) at that first IEP meeting.

18. Plaintiffs did not hear from AIU until April 15,2003, when they received a phone call from AIU inquiring as to whether Plaintiffs had received correspondence mailed to them on March 31, 2003, and April 12, 2003, and scheduled a second IEP meeting for April 17, 2003. Plaintiffs had not received such correspondence, and responded with a facsimile letter asking that such a last minute meeting be rescheduled. Later that day on April 15, 2003, Plaintiffs received only the original of AIU's Invitation to Attend IEP Meeting on April 17, 2003.

19. There was an apparent breakdown in communication between the parties in April 2003. The Court finds that Defendants mailed letter notices to Plaintiffs, but that Plaintiffs, in fact, did not receive them until April 16, 2003, when Plaintiffs received by Federal Express and facsimile (sent April 15), copies of AIU's letters dated March 31, 2003, and April 15, 2003, whereby, *inter alia,* it was agreed that the second IEP meeting would be rescheduled.

20. On April 16, 2003, AIU made the unilateral decision, without a hearing, to terminate all of Georgia's IFSP services, not just the conductive education, and contacted her service providers by telephone and directed them to stop the provision of all services upon her third birthday on April 18, 2003. Plaintiffs were advised of this termination of services on April 16, 2003, during the provision of services by Georgia's physical therapist and conductive educator, and had no forewarning, given that AIU's prior indications were that only the conductive education would be terminated pending the dispute. AIU made no effort to call or make any contact with Plaintiffs to inform them that the decision had been made to terminate all of Georgia's services.

21. On April 18, 2003, Georgia turned three years old and received her usual IFSP services. However, as of April 21, 2003, all of Georgia's regularly scheduled services, as per her IFSP, had been discontinued or terminated. AIU's position was that the IDEA'S "stay-put" rule, or pendency provision, 20 U.S.C. § 1415(j), did not apply to a transition from an IFSP to an IEP at age 3, and contended it was not obliged to maintain the status-quo of IFSP services during disputes in transition, but only to schedule a meeting to propose its IEP. Plaintiffs understanding is that AIU required them to attend the scheduled meeting and sign in agreement with AIU's proposed IEP or NOREP, if Plaintiffs were to receive those services proposed by AIU, and only those services, pending any dispute. Not unreasonably, Plaintiffs perception is that AIU was offering them its proposed services as the IEP plan, take it or leave it.

22. Plaintiffs responded by letter of April 21, 2003, confirming the communications of the past week, taking exception with AIU's position and representations, demanding that the services be reinstated as per the IDEA'S stay-put rule *in lieu* of the instant civil action, asserting that AIU's efforts to proceed with an IEP meeting were premature given the pending dispute over an independent evaluation, and advising that if a NOREP was necessary for the continued provision of services, they would sign one that explicitly included all of the same services and terms of their IFSP.

23. Plaintiffs attended AIU's scheduled IEP meeting on May 1, 2003 under protest. AIU presented Plaintiffs, for the first time, its proposed NOREP for only those IDEA services it deemed appropriate, and it excluded conductive education. Plaintiffs were not privy to the terms of AIU's NOREP until that day. AIU refused to offer Plaintiffs a NOREP that included all of the IFSP related services and Plaintiffs signed their objection to AIU's

NOREP as such. Nevertheless, the AIU has not restarted Georgia's IDEA services.

24. The services provided Georgia under her IFSP have not been provided by AIT or AIU, and she has received no publicly provided IDEA services or educational benefits, since April 18, 2003.

25. Plaintiffs have paid $160.00 out-of-pocket for two sessions of conductive education services from the same IFSP provider, one for the week of April 21, 2003 and one for the week of April 28, 2003, in an effort to maintain some continuous treatment. On May 2, 2003, Georgia and Jennifer Pardini traveled to the Euromed Rehabilitation Center in Mielno, Poland. The Euromed provided for a month of intensive specialized treatment and therapy, somewhat, in place of Georgia's terminated IDEA services, at a flat-rate out-of-pocket cost of $7500.00 (exclusive of travel costs). Plaintiffs also have paid $475.00 out-of-pocket for a month of services through United Cerebral Palsy/North Coast Ohio Conductive Education of Cleveland and $480.00 to the Ronald McDonald House of Cleveland for the same month of July 2003 (exclusive of travel costs).

26. Because defendants have terminated the IFSP services, Plaintiffs have arranged for and are committed to the provision of substitute services via United Cerebral Palsy/North Coast Ohio Conductive Education for the month of September 2003, and the provision of all modalities via the Euromed from October 15, 2003 to November 15, 2003.

27. Mrs. Pardini, who the Court finds credible, articulate and sincere, stated that the parents' financial resources are strained to near-breaking point by paying for

the private conductive education, related services and travel costs for Georgia's continuing development.

28. The Pardinis reasonably believe that conductive education, which was provided by AIT at AIT's instigation, has proven quite effective and most beneficial to Georgia.

29. AIU apparently refused to even consider the appropriateness and effectiveness of conductive education for Georgia's educational development as part of its proposed IEP, prior to presenting that IEP to the parents.

30. However, due process hearing and administrative appeal procedures provided by Pennsylvania pursuant to the IDEA are in place, wherein it can be determined administratively and initially by a neutral hearing officer, then by the Pennsylvania Department of Education's Special Education Appeals Panel, whether a meaningful and appropriate IEP should include such conductive education for Georgia, or whether the alternatives offered by AIU are adequate to ensure her meaningful progress.

31. Although such administrative procedures are available, this Court finds that, in light of the somewhat inexplicable communication problems and institutional stubbornness exhibited by AIU to date (i.e., its "take it or leave it" approach), that the Pardinis face a bewildering bureaucratic nightmare. This bureaucracy must be particularly daunting to young parents who are financially strapped and emotionally pressed to provide for the special present needs of their child.

III. CONCLUSIONS OF LAW

1. As will be explained below, the stay-put provision of the IDEA does not require the AIU to provide the exact same educational program that had been provided by the AIT, a different agency with different funding streams, providing services for children of ages 0 to three.

2. The responsibility for choosing the educational method most suitable to the child's needs is left to the educational agency.

3. Part B of the IDEA requires that States provide a free appropriate public education ("FAPE") to eligible children with disabilities from age three to twenty-one, 20 U.S.C.§ 1412; 34 C.F.R. Part 300.

4. FAPE means special education and related services that meet state standards, provided in conformity with an IEP, at public expense, under public supervision and direction, without charge, and include an appropriate preschool, elementary, or secondary school education. 20 U.S.C. § 1401(8).

5. Under the birth to three years program, an Individualized Family Service Plan (IFSP) is family centered, focusing on the needs of the family to help the child. An IEP is centered and responsive to the needs of the individual child, particularly his or her educational needs and related services.

6. An IFSP is a medical model, which requires a 25% delay in one or more developmental areas to be eligible. An IEP is an educational model which requires a 25% delay in a developmental area and a need for specially designed instruction.

7. The focus of the AIU's 3-5 years program is to allow the child to participate in appropriate preschool activities with nondisabled peers to the maximum extent possible.

8. Each state is obligated to ensure that a FAPE is made available to each eligible child residing in the state, beginning no later than the child's third birthday; and an IEP or IFSP is to be in effect for the child by that date. 34 C.F.R. § 300.121(c).

9. An initial evaluation for educational service under Part B of the Act must determine whether the child is a child with a disability and if so, determine the educational needs of the child. 34 C.F.R. § 300.320(a)(1),(2).

10. States are not required to continue the IFSP when a child reaches the age of three, the transition year. IFSPs may serve as the IEP if the agency and parents both agree. 34 C.F.R. § 300.342(c)(1).

11. An IFSP may serve as the IEP if it is (i) consistent with State policy; and (ii) agreed to by the agency and the child's parents. 34 C.F.R. § 3003.342(c)(1).

12. The IDEA recognizes mat the IEP will not contain the same components of the IFSP because the mandated transition process is to include procedures to help the child for changes in service delivery, including steps to adjust to and function in a new setting. 34 C.F.R. § 300.344(h).

13. When a child reaches the age of three, states are required to develop policies and procedures to facilitate the smooth transition from an IFSP to an IEP. 20 U.S.C. § 1413(a)(15).

14. The policies and procedures are to ensure that the new agency will provide adequate notice to the family of the need to evaluate for IEP eligibility, the change in the model of services, and the change in the provider agency.

15. A child is only entitled to receive such services as are required to assist the child to benefit from special education.

16. The stay-put provision of the IDEA provides that the appropriate early intervention services currently provided shall continue, or if applying for initial services, that the child shall receive the services not in dispute. 20 U.S.C. § 1415(j), § 1439(b) (emphasis added).

17. Plaintiffs are in the transition process of applying for initial services under Part B. The applicable stay-put placement for a three-year old child is the proposed public school placement and program. 34 C.F.R, § 300.514 (formerly 34 C.F.R. § 300.513).

18. Under 34 C.F.R. § 300.514, if a dispute arises about a child's initial placement in the public school program, the position of the United States Office of Special Education Program ("OSEP") is that the stay-put is the public school program, not the birth to three year IFSP services. *Letter to Klebanoff,* 28 IDELR 478, January 23, 1997 (OSEP's interpretation of former stay-put provision at section 300.513); *Johnson v. Special Educ. Hearing Office,* 287 F.3d 1176, 1180-82 (9th Cir. 2002). OSEP's interpretation of the stay-put provision, by the agency charged with its implementation, is entitled to *substantial* deference. *See e.g., Michael C. v. Radnor Township School Dist.,* 202 F.3d 642, 649-52 (3d Cir. 2000) (OSEP's policy memorandum regarding stay-put provision in the context of a student's transfer from

an out of state public school was given substantial, albeit not controlling, deference).

19. The primary responsibility for formulating the education to be accorded to a handicapped child, and for choosing the educational method most suitable to the child's needs was left by the IDEA to the state and local educational agencies. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

20. So long as a school district or educational agency offers a student FAPE, the educational authority has discretion over what instructional methodologies will be used. *E.S. v. Indep. School Dist. No. 196*, 27 IDELR 503 (8th Cir. 1998).

21. When responsibility transfers from one public agency to another, "the new public agency is required only to provide a program that is in conformity with the placement in the last agreed upon IEP or IFSP." *Johnson*, 287 F.3d at 1181. "The new agency need not, and probably could not, provide the exact same educational program." *Id.*

22. Even if Plaintiffs' request for an exclusive methodology of conductive education is "ideal," the IDEA does not require the provision of an ideal education. *M.B. v. Arlington Central Sch. Dist.*, 36 IDELR 130 (S.D.N.Y. 2002).

Exhaustion.

23. Exhaustion of administrative remedies and procedures is required where, as here, the particular expertise of an educational hearing officer is necessary to develop a factual record. *Lester H. v. Gilhool*, 916 F.2d 865, 869 (3d Cir. 1990). Plaintiffs' complaint states causes of action for "Violations of the IDEA," and for constitutional

procedural Due Process violations, "Due process—claim pursuant to [42 U.S.C.] § 1983." Complaint, ¶¶ 30-31, 32-34.

24. "Before a plaintiff can bring a claim for an IDEA violation, he must exhaust his administrative remedies, including a local due process hearing and an appeal to a state agency. 20 U.S.C. § 1415. This allows a school district to bring its expertise to bear and affords the state an opportunity to correct its own mistakes." *Honig v. Doe*, 484 U.S. 305, 326-27. 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) (citations omitted). This exhaustion prerequisite cannot be circumvented by recasting what is in essence an IDEA claim as some other cause of action, such as a section 1983 action. *W.B. v. Matula*, 67 F.3d 484, 495 ("3d Cir. 1995).

25. The IDEA provides that any person aggrieved by a final decision under subsection (f) or (k) (i.e., after a local due process hearing), or by a final decision by a state educational agency where an appeal to the state agency is provided by the state, shall have the right to bring a civil action in any state court of competent jurisdiction or in federal district court. 20 U.S.C § 1415(i)(2)(A). The IDEA further requires mat an aggrieved party must exhaust all administrative procedures before bringing an IDEA claim in state or federal court, or a claim under another statute seeking relief which could be obtained under the IDEA. 20 U.S.C. § 1415(I). ("Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, *except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.*") (emphasis added).

26. These administrative local and state procedures, though they undoubtedly seem ponderous to anxious parents who are attempting to provide the best services possible to their special needs child, provide an opportunity for the "state and local agencies to exercise discretion and expertise in fields in which they have substantial experience ..., thus carry [ing] out congressional intent and providing] a means to develop a complete factual record." *Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 779 (3d Cir. 1994). See 34 C.F.R. § 300.510 (procedures on appeal to state agency). Accordingly, unless exhaustion is excused because pursuit of administrative remedies would be futile or the child would be irreparably harmed, or because of one of the other narrow exceptions to the exhaustion requirement not applicable here, parents must pursue the administrative remedies available to them under the IDEA, i.e., due process hearings and appeals to state agencies where provided by the state, before they may bring a civil action in state or federal court for violations of the IDEA or section 1983 claims repackaging the IDEA claims in different legal wrapping. *Jeremy H. v. Mt. Lebanon School Dist.*, 95 F.3d 272, 281 (3d Cir. 1996); *Matula*, 67 F.3d at 495-96; *Hornstine v. Township of Moorestown*, 263 F.Supp.2d 887, 900 (D.N.J. 2003); *Frith v. Galeton Area School Dist.*, 900 F.Supp. 706, 710-11 (M.D.Pa.1995).

27. Plaintiffs have offered insufficient evidence to support the assertions in their complaint that pursuit of administrative remedies would be futile or that Georgia would be irreparably harmed by the Court's refusal to enjoin AIU to continue her IFSP services pending resolution of the dispute over her IEP. Conclusory allegations of futility and irreparable harm are not sufficient to override Congress' carefully constructed administrative scheme, designed to bring educational and developmental expertise to bear on special needs of children. *See Komninos* and *Frith.*

28. A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency and the agency evaluation is determined to be inappropriate. If the parent request an independent evaluation, the public agency must without unnecessary delay either initiate a hearing to show that its evaluation is appropriate or grant the parent's request. 34 C.F.R. § 300.502(b)(1)(2).

29. If the parent has obtained an independent evaluation at private expense, the results of the evaluation must be considered by the IEP team if it meets agency criteria. 34 C.F.R. § 300.502(c). The term "consider" does not mandate die local agency's acceptance of the recommendations set forth in the report.

30. An evaluation shall be conducted by early intervention agencies for children who are thought to be eligible. The evaluation must be sufficient in scope and depth to investigate information relevant to the young child's suspected disability, including physical development, cognitive and sensory development, learning problems, learning strengths and educational needs, communication development, self-help skills and health considerations. 22 Pa.Code § 14.153.

31. A NOREP is a Notice of Recommended Educational Placement utilized by an educational agency to communicate to parents an action proposed or an action refused, notice triggers the parents right to determine how to proceed if there is a dispute. 34 C.F.R. § 300.503(a)(b).

32. Parental consent must be obtained before an initial evaluation and the initial provision of special education and related services to a child with a disability. 34 C.F.R. § 300.505. Consent for an initial evaluation may not

be construed as consent for initial placement 34 C.F.R. § 300.505(a)(2).

33. An appropriate IEP is one that meets the procedural and substantive regulatory requirements and is one that is designed to provide meaningful educational benefit to the child. *Bd. of Educ. v. Rowley.*

34. Compensatory education is designed to remedy a failure to provide an appropriate education for a period of time. *Lester H. v. Gilhool*, 916 F.2d at 871-74. There is a threshold question of whether or not an appropriate program was offered and/or provided. An appropriate program is one "reasonably calculated to enable the child to receive educational benefits." *Ridgewood Bd. of Educ. v. N.E. for M.E.* 172 F.3d 238 (3d Cir. 1999).

IV. CONCLUSION.

Mr. and Mrs. Pardini are reasonable, concerned parents, and they sincerely believe, based upon their first hand, positive experience with Georgia's conductive education first proposed and implemented by AIT, that conductive education is the most effective and beneficial methodology Georgia can receive at this stage of her development. The Pardinis are understandably concerned that Georgia's progress will be delayed if it is not provided in her IEP, or alternatively, that they will be financially and emotionally drained if they have to find private providers of such services. This Court is quite sympathetic to the Pardinis' predicament and admires their efforts to protect and provide for their daughter. However, unfortunately, the IFSP provided by AIT does not constitute a "continuing educational placement" for purposes of the stay-put provision of the IDEA, and defendant AIU is not, therefore, compelled to duplicate the identical services in its proposed IEP.

Instead, Plaintiffs must pursue and exhaust their administrative remedies, albeit potentially frustrating, including due process hearings and an appeal to the Pennsylvania Board of Education's Special Education Appeals Panel, and attain a final decision as to their right to an independent evaluation at public expense and the necessity and appropriateness of including conductive education as part of Georgia's IEP. This administrative procedure must not be permitted to remain a bureaucratic nightmare, however.

The Court urges--indeed, *expects*- -the AIU and the Pardinis to fully and in good faith cooperate in expediting the due process proceedings and any appeal that may be filed to the Special Education Appeals Panel. It is painfully obvious that it is not in Georgia's interests to protract these proceedings any more than is inherently necessary. Conversely, it is in Georgia's best interest for the parties to forge an amicable and cooperative alliance, working toward the common goal of swiftly achieving a fair and just resolution of the disputed issues over Georgia's IEP.

The Court's order today closes this case. However, in the unlikely event that this Court's expectations of cooperation prove overly optimistic, it will retain jurisdiction to entertain a motion to reopen this civil action, should one or both parties unreasonably delay the administrative proceedings or otherwise engage in tactics that would thwart the legislative intent to ensure that all disabled children receive a free and appropriate public education. In such a scenario, the IDEA mechanisms would have proven inadequate and futile, arguably, and that would raise the likelihood that exhaustion would be excused.

Based upon the forgoing, the Court will deny plaintiffs' motion for injunctive and other relief. An appropriate order will follow.

ORDER OF COURT

For the reasons set forth in the accompanying memorandum opinion, **IT IS HEREBY ORDERED** that plaintiffs' complaint requesting injunctive and other relief is denied, and judgment is entered for defendants.

Defendants' motion for summary judgment (Document No. 26) is **GRANTED IN PART**, to the extent It seeks dismissal of the complaint against Ms. Minzenberg; otherwise, said motion for summary judgment is **DENIED as moot.**

This Court retains jurisdiction to the limited extent set forth in the accompanying opinion.

The Clerk of Court shall mark this case closed.

280 F.Supp.2d 447, 181 Ed. Law Rep. 550

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[ENTERED: OCTOBER 5, 2005]

Nos: 03-2897 & 03-3988

DAVID AND JENNIFER PARDINI, on behalf of themselves and on behalf of their minor child, GEORGIA PARDINI,

Appellants

v.

ALLEGHENY INTERMEDIATE UNIT; BARBARA MINZENBERG, Program Director

SUR PETITION FOR REHEARING EN BANC

BEFORE: SCIRICA, Chief Judge, SLOVITER, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, VAN ANTWERPEN, Circuit Judges and BUCKWALTER, District Judge[1]

The petition for rehearing on behalf of Appellee in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the

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[1] Hon. Ronald L. Buckwalter, U.S. District Court for the Eastern District of Pennsylvania, vote is limited to panel rehearing only. Judge Fisher, Circuit Judge recused.

decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for rehearing en banc is hereby **DENIED.**

IT IS SO ORDERED.

By the Court,

/s/ Theodore A. McKee
Circuit Judge

DATED: October 5, 2005
par/cc: D.D.P., Esq.
J.F.S., Esq.
L.F.T., Esq.
W.C.A., Esq.
C.L., Esq.

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

[ENTERED: OCTOBER 8, 2003]

ORDER

To: Office for Dispute Resolution
Ms. Betty Smeltzer
William Andrews, Esq.
Mr. and Mrs. David Pardini

From: Dennis T. Fair, Ph.D. /s/ Dennis T. Fair
Hearing Officer

Subject: Discontinuance of Hearing for
Georgia Pardini
(File # 2455/02/03)

Date: October 8, 2003

It is hereby ordered that the Due Process Hearing for Georgia Pardini in the Allegheny Intermediate Unit 3 is discontinued.

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

[ENTERED: JUNE 19, 2003]

ORDER

To: Ms. Betty Smeltzer
William Andrews, Esq.
Mr. and Mrs. David Pardini
Office for Dispute Resolution

From: Dennis T. Fair, Ph. D.
Hearing Officer

Subject: Order from Conference Call of June 12, 2003

Date: June 19, 2003

A due process hearing for Georgia Pardini was held on 6/10/03. The transcript for that hearing has not been received as of this time. During the hearing of 6/10/03, the parties agreed that the issue of concern was whether Georgia should receive an independent educational evaluation (IEE) at public expense.

Prior to the hearing, the parents filed for a temporary restraining order in the United States District Court for the Western District of Pennsylvania. On 5/30/03 they argued the merits of this issue before Judge Arthur Schwab. These proceedings were concerned with whether Georgia's individual family service plan (IFSP) was pendent.

After oral arguments from the parties, Judge Schwab made the following findings of fact:

1. Georgia was born on 4/18/00 (NT, 27).

2. As of 12/20/02, Georgia's IFSP provided by the Alliance for Infants and Toddlers, Inc. included PT for one-hour sessions twice per week, OT, once per week, and CE one-hour sessions three times per week (NT, 27).

3. On, or about 2/25/03, Georgia was reevaluated by the Allegheny Intermediate Unit (AIU) in anticipation of her third birthday on 4/18/03 for transitioning her educational placement and services from the IFSP to an individual education program (IEP) as required by the IDEA. This ER confirmed her qualification for special education placement and related services in the form of an IEP. The IEP was completed on or about 3/7/03 and received by the Pardinis on or about 3/15/03 under an undated letter directing them to read the report, sign the original, and return it in an enclosed envelope within five days. They were to write a statement on a separate sheet of paper describing any areas of disagreement (NT, 27-28).

4. The first IEP meeting was on 3/24/03, and the Pardinis refused to sign or agree to the ER (NT, 28).

5. The Pardinis requested IEE information as to where to obtain one which would incorporate CE. The AIU advised them that it would seek a due process hearing to prove the appropriateness of its ER and thus deny the public expense of an IEE (NT, 28).

6. The Pardinis requested all services under the IFSP continue as Georgia's current educational placement and remain in place pending the resolution of any dispute (NT, 28).

7. The Pardinis confirmed these representations by letter of 3/25/03 and further requested the specific authority AIU to rely on to selectively terminate the provision of CE (NT, 28).

8. On 4/16/03, the Pardinis received a fax including copies of the AIU's response letters dated 3/31/03 and 4/15/03 wherein it was agreed the second IEP meeting scheduled for 4/17/03 would be rescheduled. IEP meetings were held on 3/24/03 and 5/1/03 (NT, 28-29).

9. The Pardinis demanded a written communication expressly stating that all the services under Georgia's current IFSP, not just CE, would be terminated or discontinued for whatever reason as of or after her third birthday on 4/18/03. The AIU responded by fax stating that the status of the EI services for Georgia is: (1) You have requested an IEE and the AIU is obligated to request due process to defend the appropriateness of its evaluation. (2) AIU staff members attempted to conduct an IEP meeting on 3/24/03, but the Pardinis did not proceed at that meeting. (3) On Georgia's third birthday, the infant toddler program is no longer in effect. (4) A series of additional dates for the IEP meeting were offered so the parties could agree on an

interim FAPE. (5) We cannot proceed with provisions of services without parental permission via a signed NOREP (NT, 29).

10. On 4/18/03, Georgia turned three years old and received her usual IFSP services. However, on 4/21/03, all of her regularly scheduled services as per her current IFSP educational placement were discontinued. The Pardinis responded by letter the same day confirming the communications of the past week, taking exceptions with the AIU's position and demanding the services be reinstated per the IDEA'S stay put rule (NT, 30).

11. The Pardinis placed Georgia for two sessions of CE services, one for the week of 4/21/03 and one for the week of 4/28/03. The Pardinis attached a copy of the unpaid invoices to their filings (NT, 30).

12. Due process hearings are scheduled for 6/10/03 and 6/12/03 (NT, 30).

13. The Pardinis were offered due process hearings in 5/03, but declined those so that the first scheduled hearings that were convenient were 6/10/03 and 6/12/03 (NT, 30).

Judge Schwab next turned to his conclusions of law. He said that when ruling on a motion for preliminary injunctive relief, a district court must be convinced that the consideration of four factors favors the granting of preliminary relief. They include (1) The likelihood the moving party will succeed on the merits. (2) The extent to

which the moving party will suffer irreparable harm without injunctive relief. (3) The extent to which the non-moving party will suffer irreparable harm if injunctive relief is used. (4) The public interest.

Judge Schwab stated that 20 U.S.C. §1415(j) requires that during pendency of dispute proceedings unless the local agency and parents agree otherwise, the child shall remain in his/her current educational placement. The purpose is to keep the local education agency (LEA) from exercising unilateral authority to change the current educational placement. 34 C.F.R. §300.514(b) requires that if the complaint involving application for initial admission to public school, the child with the consent of the parents must be placed in a public school until the completion of all proceedings.

The application of the law to the facts is at age three Georgia had to transition from the IFSP provided by the Department of Public Welfare (DPW) to an IEP provided by the AIU. The parents and AIU disagree over what her IEP should be, and a due process hearing is scheduled for 6/10 and 6/12/03 to resolve this dispute and determine whether the proposed IEP, which does not contain conductive education, is appropriate. Until this dispute is decided, the stay put provisions of IDEA require that Georgia remain in her current educational placement during the pendency of the dispute.

The court must determine what constitutes current educational placement. If it means her previous IFSP services, which she has received from birth to age three, then the AIU's failure to provide them constitutes a violation of IDEA, and preliminary injunction should be granted. If the current placement means the proposed interim IEP suggested by the AIU, which will be evaluated

for its appropriateness at the upcoming hearing, then the preliminary injunction should not be granted.

Judge Schwab concluded that Georgia is making a transition from an IFSP to an IEP requiring her to move from services administered by the DPW to those administered by the AIU. He stated that the AIU cannot be expected to provide the same exact services that DPW provided because of differences in budget and goals of a family-oriented program versus an educational-oriented program. He concluded that the AIU's proposed interim IEP appears to be in conformity with the last agreed upon IFSP placement because it contains all the services except conductive education, which the AIU contends are not necessary to achieve the educational goals of the IEP.

During a conference call between the parties on 6/12/03, the Hearing Officer concurred with the findings of Judge Schwab, and held that Georgia Pardini's IFSP is not pendent. The parties requested a written order. Accordingly, it is ordered that Georgia Pardini's IFSP is not pendent. Therefore, the issue of concern at her due process hearing is whether the parents should receive an IEE at public expense.

6/19/03
Date

/s/ Dennis T. Fair
Dennis T. Fair, Ph.D.
Hearing Officer

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

[ENTERED: JUNE 19, 2003]

ORDER

To:	Office for Dispute Resolution Ms. Betty Smeltzer William Andrews, Esq. Mr. and Mrs. David Pardini
From:	Dennis T. Fair, Ph.D. /s/ Dennis T. Fair Hearing Officer
Subject:	Discontinuance of Hearing for Georgia Pardini (File #2517/02-03)
Date:	June 19, 2003

It is hereby ordered that the Due Process Hearing for Georgia Pardini in the Allegheny Intermediate Unit is discontinued.

David Pardini
3256 Waltham Avenue
Pittsburgh, PA 15216
(412) 973-2691
(412) 344-7051

September 29, 2003

Dennis T. Fair
530 North Main Street, Apt. 509
Butler, PA 16001

RE: Pardini v.
Allegheny Intermediate Unit, et. al.
ODR 2455/02-03

Dear Hearing Officer Fair:

Please accept this letter as written notification that we are waiving and withdrawing our argument with respect to the Independent Evaluation in the above-referenced matter. You may relinquish jurisdiction and discontinue all hearings. Thank you.

Sincerely,

/s/ David Pardini
David Pardini

Enclosure
DDP/ams

cc: William Andrews, Esq.

28 IDELR 478

Klebanoff, Letter to (Stay-Put)

Office of Special Education Programs

Mr. Howard Klebanoff
Attorney at Law
1305 Boston Post Road, Suite 301
Fairfield, CT 06432

Digest of Inquiry
January 23, 1997

• Does the stay-put provision require the continued placement of a 3-year-old child in the private nursery school program he was placed at by the Birth to Three Program during a review of the proposed initial, public school placement?

Digest of Response
July 1, 1997

Early Intervention Placement Was Not Stay-Put Placement For 3-Year-Old
OSEP analyzed 34 C.F.R. 300.513 and concluded that under this regulation, the applicable stay-put placement for the child was the proposed public school program. Under 300.513, if a dispute arises about a child's initial public school program, the stay-put placement is the public school program, not the early intervention program the child participated in under Part H. Since the dispute in this case involved the child's initial public school placement, the district was not obligated to maintain the child's private nursery school program pending resolution of the dispute about his placement.

Text of Inquiry

I have an inquiry regarding the application of 34 CFR 513, maintenance of placement during appeal proceedings. During an appeal proceeding, does the "stay put" provision apply to a student whose current placement was made by the Department of Mental Retardation through the Birth to Three Program?

In Connecticut, the Birth to Three Program, 34 CFR 303, is administered by the Department of Mental Retardation, not the Department of Education. The statute which authorizes the Birth to Three program was written to work as a companion statute to IDEA. The program targets children who could benefit from educational services prior to age three.

PC is a three year old (9/13/93) diagnosed with developmental dyspraxia. PC was evaluated by the Birth to Three program and began to receive a variety of educational services at home in April, 1995. In September 1995, the Birth to Three program placed him in a private nursery school. The parents first met with the local school district in February 1996. Over the Spring, the school evaluated PC and determined that he was eligible for special education services. The school recommended placement in a public school preschool program. The parents disagreed with the school's proposed education plan, believing that the private school was a more appropriate setting for PC. The parents have filed for a due process hearing.

Does the nursery school where PC was placed by the Birth to Three program constitute his "current education program" under 34 CFR 300.513. This issue is beginning to surface in several other cases where placements have been made by the Birth to Three program.

If you have any questions, please contact us.

Text of Response

This is in response to your letter to the Office of Special Education Programs (OSEP) dated January 23, 1997, requesting clarification regarding the application of 34 CFR § 300.513 in the following situation:

During an appeal proceeding, does the "stay put" provision apply to a student whose current placement was made by the Department of Mental Retardation through the Birth to Three Program? Does the nursery school where (a child) was placed by the Birth to Three program constitute [the] "current education program" "under 34 CFR § 130.513.

Section 300.513 of the regulations implementing Part B of the Individuals with Disabilities Education Act (Part B) provides:

> (a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.
>
> (b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion, of all the proceedings.

34 CFR § 300.513.

Based on the information provided in your letter, it in our understanding that the Connecticut Department of Mental Retardation placed the two-year-old child in the program at

the private nursery school as a means of providing that child and his family appropriate early intervention-services under Part H of the Individuals with Disabilities Education Act (Part H). When the child turned three, the school district had offered the child the placement in the public school preschool program as a means of providing him a free appropriate public education (FAPE) under Part B. It in this proposed public preschool placement with which the parents disagree. We understand your letter to be asking whether a placement that was intended to provide a disabled infant or toddler and his or her family with appropriate early intervention services under Part H would constitute the child's "present educational placement" under 34 CFR § 330.513.

OSEP does not interpret 34 CFR § 300.513 as requiring a public agency responsible for providing FAPE to a disabled child to maintain that child in a program developed for a two-year-old child as a means of providing that child and his or her family appropriate early intervention services under Part H. Rather, in the situation prompting your inquiry, the complaint involves a child's initial admission to public school. Therefore, it is OSEP's view that, in this instance, to meet its obligation under 34 CFR § 300.513(b), the public agency responsible for providing FAPE to the child would place that child, with the consent of the parents, in the public preschool program until the completion of authorized review proceedings. 34 CFR § 300.513(b).

We hope that you find this explanation helpful. If we can be of further assistance, please feel free to contact Dr. JoLeta Reynolds at (202) 205-5507 or Ms. Rhonda Weiss at (202) 205-9053.

20 U.S.C.A. § 1415

Effective: July 01, 2005

§ 1415. Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(2)(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or die child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of - -

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing die child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 11434a(6) of Title 42, the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(l) of this section, whenever the local educational agency - -

(A) proposes to initiate or change; or

(B) refuses to initiate or change,

the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

(5) An opportunity for mediation, in accordance with subsection (e) of this section.

(6) An opportunity for any party to present a complaint - -

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) of this section shall apply to the timeline described in this subparagraph.

(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) of this section (which shall remain confidential) - -

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include - -

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 11434a(2) of Title 42, available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

(c) Notification requirements

(1) Content of prior written notice

The notice required by subsection (b)(3) of this section shall include—

(A) a description of the action- proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural

safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

(2) Due process complaint notice

(A) Complaint

The due process complaint notice required under subsection (b)(7)(A) of this section shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A) of this section.

(B) Response to complaint

(i) Local educational agency response

(I) In general

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's

due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include- -

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

(cc)a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

(II) Sufficiency

A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

(ii) Other party response

Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint a

response that specifically addresses the issues raised in the complaint.

(C) Timing

The party providing a hearing officer notification under subparagraph (A) shall provide the notification within 15 days of receiving the complaint.

(D) Determination

Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A) of this section, and shall immediately notify the parties in writing of such determination.

(E) Amended complaint notice

(i) In general

A party may amend its due process complaint notice only if—

(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B) of this section; or

(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(ii) Applicable timeline

The applicable timeline for a due process hearing under this subchapter shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B) of this section.

(d) Procedural safeguards notice

(1) In general

(A) Copy to parents

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parents - -

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6) of this section; and

(iii) upon request by a parent.

(B) Internet website

A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(2) Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to- -

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) the opportunity to present and resolve complaints, including- -

(i) the time period in which to make a complaint;

(ii) the opportunity for the agency to resolve the complaint; and

(iii) the availability of mediation;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees,

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6) of this section, to resolve such disputes through a mediation process.

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f) of this section, or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) Opportunity to meet with a disinterested party

A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with- -

(i) a parent training and information center or community parent resource center in the State established under section 1471 or 1472 of this title; or

(ii) an appropriate alternative dispute resolution entity, to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) List of qualified mediators

The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) Costs

The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Scheduling and location

Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) Written agreement

In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that- -

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(G) Mediation discussions

Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

(f) Impartial due process hearing

(1) In general

(A) Hearing

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session

(i) Preliminary meeting

Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint- -

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decision making authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e) of this section.

(ii) Hearing

If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this subchapter shall commence.

(iii) Written settlement agreement

In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is- -

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period

If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

(2) Disclosure of evaluations and recommendations

(A) In general

Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

(B) Failure to disclose

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitations on hearing

(A) Person conducting hearing

A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum - -

(i) not be - -

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under

subsection (b)(7) of this section, unless the other party agrees otherwise.

(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the timeline

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to- -

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

(E) Decision of hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies- -

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

(g) Appeal

(1) In general

If the hearing required by subsection (f) of this section is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial review and independent decision

The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k) of this section, or an appeal conducted pursuant to subsection (g) of this section, shall be accorded- -

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which findings and decisions- -

(A) shall be made available to the public consistent with the requirements of section 1417(b) of this title (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title,

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) of this section and paragraph (2).

(B) Decision made at appeal

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who

does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court--

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs- -

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating die fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if- -

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by

the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP Team meetings

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) of this section.

(iii) Opportunity to resolve complaints

A meeting conducted pursuant to subsection (f)(1)(B)(i) of this section shall not be considered—

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that - -

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A) of this section,

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement

Except as provided in subsection (k)(4) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then- current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting

(1) Authority of school personnel

(A) Case-by-case determination

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

(B) Authority

School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

(C) Additional authority

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title although it may be provided in an interim alternative educational setting.

(D) Services

A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall - -

(i) continue to receive educational services, as provided in section 1412(a)(1) of this title, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(E) Manifestation determination

(i) In general

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine - -

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

(F) Determination that behavior was a manifestation

If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall- -

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

(G) Special circumstances

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child - -

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(H) Notification

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

(2) Determination of setting

The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

(3) Appeal

(A) In general

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection,

or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

(B) Authority of hearing officer

(i) In general

A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order

In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may - -

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

(4) Placement during appeals

When an appeal under paragraph (3) has been requested by either the parent or the local educational agency - -

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

(5) Protections for children not yet eligible for special education and related services

(A) In general

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred - -

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(C) Exception

A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 1414 of this title or has refused services under this subchapter or the child has been evaluated and it was determined that the child was not a child with a disability under this subchapter.

(D) Conditions that apply if no basis of knowledge

(i) In general

If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the

child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(6) Referral to and action by law enforcement and judicial authorities

(A) Rule of construction

Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) Transmittal of records

An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(7) Definitions

In this subsection:

(A) Controlled substance

The term "controlled substance" means a drug or other substance identified under schedule I, II, III, IV, or V in section 812(c) of Title 21.

(B) Illegal drug

The term "illegal drug" means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(C) Weapon

The term "weapon" has the meaning given the term "dangerous weapon" under section 930(g)(2) of Title 18.

(D) Serious bodily injury

The term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of Title 18.

(l) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.CA. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter 3 the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under tin's subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law) - -

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this subchapter transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule

If, under State law, a child with a disability who has reached die age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.

(n) Electronic mail

A parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the agency makes such option available.

(o) Separate complaint

Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

20 U.S.C.A. § 1439

Effective: July 01, 2005

(a) Minimum procedures

The procedural safeguards required to be included in a statewide system under section 1435(a)(13) of this title shall provide, at a minimum, the following:

(1) The timely administrative resolution of complaints by parents. Any party aggrieved by the findings and decision regarding an administrative complaint shall have the right to bring a civil action with respect to the complaint in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(2) The right to confidentiality of personally identifiable information, including the right of parents to written notice of and written consent to the exchange of such information among agencies consistent with Federal and State law.

(3) The right of the parents to determine whether they, their infant or toddler, or other family members will accept or decline any early intervention service under this subchapter in accordance with State law without jeopardizing other early intervention services under this subchapter.

(4) The opportunity for parents to examine records relating to assessment, screening, eligibility determinations, and the development and implementation of the individualized family service plan.

(5) Procedures to protect the rights of the infant or toddler whenever the parents of the infant or toddler are not known or cannot be found or the infant or toddler is a ward of the State, including the assignment of an individual (who shall not be an employee of the State lead agency, or other State agency, and who shall not be any person, or any employee of a person, providing early intervention services to the infant or toddler or any family member of the infant or toddler) to act as a surrogate for the parents.

(6) Written prior notice to the parents of the infant or toddler with a disability whenever the State agency or service provider proposes to initiate or change or refuses to initiate or change the identification, evaluation, or placement of the infant or toddler with a disability, or the provision of appropriate early intervention services to the infant or toddler.

(7) Procedures designed to ensure that the notice required by paragraph (6) fully informs the parents, in the parents' native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section.

(8) The right of parents to use mediation in accordance with section 1415 (e) of this title, except that - -

(A) any reference in the section to a State educational agency shall be considered to be a reference to a State's lead agency established or designated under section 1435 (a)(10) of this title;

(B) any reference in the section to a local educational agency shall be considered to be a reference to a local service provider or the State's lead agency under this subchapter, as the case may be; and

(C) any reference in the section to the provision of free appropriate public education to children with disabilities shall be considered to be a reference to the provision of appropriate early intervention services to infants and toddlers with disabilities.

(b) Services during pendency of proceedings

During the pendency of any proceeding or action involving a complaint by the parents of an infant or toddler with a disability, unless the State agency and the parents otherwise agree, the infant or toddler shall continue to receive the appropriate early intervention services currently being provided or, if applying for initial services, shall receive the services not in dispute.

No. 05-795

IN THE

Supreme Court of the United States

ALLEGHENY INTERMEDIATE UNIT, *et al.*,

Petitioners,

v.

DAVID PARDINI, *et ux.*, Individually,
and on behalf of their minor child,
GEORGIA PARDINI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether 20 U.S.C. § 1415(j) of the Individuals with Disabilities Education Act required Allegheny Intermediate Unit, the preschool early intervention agency to which Georgia Pardini transitioned on her third birthday, to provide Georgia with the services in her then-current Individualized Family Service Plan placement until a hearing officer or a court resolved the dispute between the agency and the family and decided whether different services were needed?

Whether the court of appeals abused its discretion under 20 U.S.C. § 1415(i)(3)(B) to award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party?

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STATEMENT OF THE CASE

Since 1986, the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, has required states to ensure that children with disabilities, from birth to age 21, receive special services to help with their development and learning.[1] In Pennsylvania, children with disabilities who are under age three are served in "early intervention" programs operated by their counties. Each such child has a service plan called an Individualized Family Service Plan (IFSP) designed by a team of professionals and the parents. When the disabled child reaches the age of three, his or her "early intervention" program becomes the responsibility of another IDEA agency, such as Petitioner Allegheny Intermediate Unit (AIU), and an Individualized Education Program (IEP) is to be developed – again by a team of professionals and the parents -- to complete the child's transition to a "pre-school" program. The IDEA provides that, at any point in this process, disputes regarding the services to be provided to the disabled child can be submitted to a hearing officer, whose decision can be appealed to federal or state court.

None of the key facts in this case are disputed. Georgia Pardini has cerebral palsy. Sometime after her first birthday she began receiving early intervention services under an IFSP

1. In December, 2004, the President signed a revised version of the IDEA. None of the provisions that are relevant to this case were changed. References in this Brief are to the amended statute. Since final regulations for the amended statute have not yet been issued, references are to the current regulations at 34 C.F.R. Chapter 300. None of the regulations that are cited have been changed in the proposed IDEA implementing regulations. *See*, Assistance to States for the Education of Children with Disabilities, 70 Fed. Reg. 35781 (proposed June 21, 2005).

from the county agency; the program for children with disabilities under age 3 is governed by Part C of the IDEA. On Georgia's third birthday AIU became responsible for meeting her needs and providing her services under the IDEA, which at that time included those already established in her IFSP by the team of professionals and parents. The preschool and school-aged programs for children with disabilities are governed by Part B of the IDEA.

AIU offered an IEP that matched Georgia's in-place and operating IFSP except for the elimination of one crucial service – conductive education. As the court of appeals noted: "Conductive education is an educational approach for children with central nervous system disabilities [,] [i]t is a holistic approach to develop problem-solving skills." Pet. App. 3a n.3. Georgia's parents rejected the offered IEP and requested a hearing to resolve the dispute. The family asked AIU to continue to provide the services in Georgia's IFSP until the hearing and appeal process was concluded. In so doing they relied on the first sentence of 20 U.S.C. § 1415(j):

> [D]uring the pendency of any proceedings. . . . the child shall remain in the then-current educational placement of such child. . . . .

AIU declined to provide the disputed service, unilaterally terminated all services – including those not in dispute – without notice or a hearing, and subsequently told the parents that the termination would remain effective until they "signed" their consent to AIU's proposed IEP as-is. This lawsuit was then filed and, despite the parents' signing of the Notice of Recommended Educational Placement (NOREP) required by AIU, all of Georgia' IDEA services

remained terminated. The family sought an injunction ordering AIU to continue to provide the services in Georgia's IFSP until the hearing process was concluded. AIU argued that this due process guarantee of program continuity and the status-quo did not protect Georgia and her family because it does not apply to disabled children transitioning from Part C early intervention programs.

On May 30, 2003, the District Court refused to issue preliminary injunctive relief. Pet. App. 27a. On June 19, 2003, a Special Education Hearing Officer concurred with the District Court's decision. Pet. App. 50a-55a. On August 29, 2003, the District Court denied the family's request for final injunctive and other relief, holding that § 1415(j) did not require AIU to maintain Georgia's services while her family sought resolution of the dispute through the IDEA's hearing process. Pet. App. 26a-46a.

The family then appealed to the Third Circuit, which ruled for the family. Pet. App. 1a-25a. The court of appeals reviewed a number of IDEA provisions designed to ensure that children with disabilities have a "smooth transition" when they turn 3 and another local agency takes over. 20 U.S.C. § 1412(a)(9). *Id.* 10a-11a, 20a. The Court noted that Congress's explicit purpose was "to promote a *seamless* system of services for children with disabilities, aged birth to five inclusive." Pet. App. 20a (citing H.R. Rep. No. 198, 102[d] Cong., 1[st] Sess. 1991, WL 185659, at 7 (emphasis in original)). The court of appeals concluded that AIU's reading of § 1415(j) would subject Georgia and other similarly situated youngsters to exactly the type of program interruption that Congress intended to prevent. *Id.* 20a-21a. The Court also awarded the attorney/father, as a prevailing *pro se* party, reasonable attorneys' fees. *Id.* 5a -6a n.4.

AIU filed a Petition for Rehearing *en banc*, which was denied by the Ccurt of Appeals on October 5, 2005. Pet. App. 47a.

REASONS FOR DENYING THE PETITION

I. AIU'S PETITION DOES NOT ESTABLISH THAT THIS DECISION MEETS THE CRITERIA FOR SUPREME COURT REVIEW

AIU asserts two justifications for Supreme Court review of the lower court's interpretation of § 1415(j): that the decision in this case conflicts with the decisions of other Circuit courts on the same issue; and that the decision of the Court of Appeals in this case is "an important question of federal law that . . . should be settled by this Court. . . ." S. Ct. R. 10. Neither assertion is correct. In fact, the decision below is the only circuit court decision that addresses whether a child's IFSP constitutes her "then current educational placement" under § 1415(j), and the decision does not conflict with any other appellate decision.[2] Moreover, AIU does not establish that this case involves an important issue of federal law that this Court must decide at this time.

The bottom line in AIU's Petition is that *certiorari* should be granted because, in its view, the case was wrongly decided by the court of appeals. The petition sets out exactly the same arguments that the lower court considered and rejected.

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2. AIU previously conceded, on numerous occasions of record, that this case involved a legal question of first impression for the Court of Appeals, and relied solely on OSEP's *Letter to Klebanoff*, 28 IDELR 478 (1997) for its position that the stay-put provision did not apply when transitioning from Part C to Part B.

A. The Court of Appeals' Decision Regarding the IDEA Is Correct and Does Not Conflict With the Decision of Any Other Court of Appeals.

AIU argues that the Third Circuit's interpretation of § 1415(j) conflicts with the Ninth Circuit decision in *Johnson v. Special Education Hearing Office*, 287 F.3d 1176 (9th Cir. 2002). As the Third Circuit pointed out at length, *Johnson* is distinguishable, and, if anything, supports the conclusion below. Pet. App. 14a-15a. *Johnson* did involve an interpretation of 20 U.S.C. § 1415(j) for a child who had turned 3 and was transitioning into the preschool early intervention program operated by his local school district. The parties in *Johnson* agreed that the school district was required to provide the child there, Nicholas, with the services in his IFSP during the hearing and appeal process, which is the very question disputed in this case.

However, Nicholas's family was not satisfied with this remedy. Nicholas's parents argued that § 1415(j)'s "stay-put" rule required the school district to use the exact same vendors the Part C agency had used to provide the services– a position that may very well have been wrong. In any event, *Johnson* is completely consistent with the decision below and the remedy requested by the Pardini family.[3]

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3. AIU also cites *D.P. and L.P v. School Board of Broward County*, 360 F. Supp. 2d 1294 (S.D. Fla. 2005), which is consistent with AIU's position. Obviously, *D.P.* does not create a circuit conflict. Moreover, although unnoted in the petition, *D.P.* was premised on the decision of the district court below, *see id.* (citing 280 F. Supp. 2d 447 (W.D. Pa. 2003), which has now been rejected by the Third Circuit.

With respect to the court of appeal's decision to award attorney/father, as a prevailing *pro se* party, reasonable attorneys' fees, AIU argues that this decision conflicts with another Third Circuit decision, *Woodside v. The School District of Philadelphia*, 248 F.3d 129 (3d Cir. 2001). First and foremost, resolving conflicts, if there were such a conflict, between panels is the job of the circuit court and is not a basis for Supreme Court review.

AIU is wrong in any event. In *Woodside* the "sole issue" was whether the IDEA authorized an award of attorneys' fees to an "attorney-parent who represented his child in administrative proceedings under the IDEA." *Id.* at 130. J. Stephan Woodside, the attorney-parent, represented his child at the administrative due process hearing level, which was concluded in the family's favor, and he then filed suit in district court seeking only attorneys' fees for that representation. Instantly, attorney/father's representation and prosecution of their meritorious claim goes well beyond the administrative proceedings level. The court of appeals relied on *Zucker v. Westinghouse*, 374 F.3d 221 (3d Cir. 2004), and explained that the IDEA gives discretion to the court to award such fees to the prevailing party, and a plaintiff's entitlement to attorneys' fees is not eliminated merely because he/she was *pro se* counsel. Pet. App. 5a-6a n.4. The lower court focused on the *pro se* counsel aspect and exercised its discretion accordingly. There is no direct conflict with *Woodside*.

B. This Case Does Not Present an Important Question of Federal Law that Warrants Supreme Court Review.

Although AIU states in its Petition that this case presents important issues that require Supreme Court review, its major rationale is that there is a "need for uniform application of the IDEA" and of § 1415(j) in particular. To the extent that this is a restatement of Petitioner's circuit-conflict argument, we reiterate that there is no conflict, and therefore no lack of "uniformity." As for whether the case presents "important issues," AIU provides no explanation of why the issues raised here are of such signal importance as to warrant this Court's attention now, before additional circuits have had the opportunity to address them.

II. PETITIONER MISSTATES THE LEGAL ISSUES IN THIS CASE, AND ITS CHALLENGE TO THE CORRECTNESS OF THE CIRCUIT COURT'S OPINION SHOULD BE REJECTED

AIU's Petition essentially is a challenge to the correctness of the decision of the court of appeals, which generally is not, in and of itself, a basis for this Court to grant a Writ of Certiorari. At any rate, AIU's arguments are incorrect. Those arguments depend on a greatly exaggerated, unproved, and unsubstantiated presentation of the differences between the section of the IDEA that relates to children with disabilities under age 3 (Part C) and the section that relates to older children with disabilities (Part B).[4] In several crucial respects AIU misstates the law altogether.

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4. In the Questions Presented, AIU describes the Part C system as a "medical model" and the Part B program as an "education program." As is demonstrated below, these distinctions are not justified by the statutory language or the implementing regulations.

The petition states that children in the Part B preschool system receive "special education" while children under age 3 do not. Pet. at 8. However, like preschoolers and older children with disabilities, infants and toddlers with disabilities are eligible under Part C for "special instruction" provided by "special educators" and for related services such as occupation and physical therapy. 20 U.S.C. §§ 1432(4)(E)(ii), (iii), (iv), (v), and (F)(i) (definition of "early intervention services" and "qualified personnel").

AIU also asserts, without citation to authority or support in the record, that the Part C system is a "medical model"; and therefore different than Part B. In fact, Part B and Part C differ little, if at all, with respect to a child's entitlement to "medical services." Both require medical services to evaluate a child and diagnose a child's disability or developmental delay. *Compare* 20 U.S.C. § 1402(26)(A), *with* 20 U.S.C. § 1432(4)(E)(viii). Likewise, Part B and Part C both mandate that children with disabilities receive nursing services from local early intervention agencies in some situations. *Compare* 34 C.F.R. § 303.12(d)(6), *with* 34 C.F.R. § 300.24(b)(12).

AIU's effort to classify Part C services as "medical" and Part B services as "educational" is belied by its offer to continue all but one of Georgia's services, irrespective of whether these services would be deemed "medical" or "educational." Its "medical/educational" distinction argument is contrived for its truly intended objective of maintaining and exercising its effectuated unilateral authority. The same is true of AIU's strained and confounding argument that the transition required of the disabled child from one program to the next at the age of three somehow equates to an "initial admission to public school" or an application "for initial

services" under the IDEA's pendency provisions. 20 U.S.C. §§ 1415(j), 1439(b). In truth, AIU is not as much concerned with providing a disabled child with appropriate IDEA services as it is with sustaining its autonomy to determine, without restraint from any source – including other responsible IDEA agencies, but especially the parents – what services it will provide to disabled children. AIU's program for Georgia was predetermined, and AIU's approach thwarted her parents and denied them any meaningful input into the decision making process.

Finally, AIU incorrectly states that Part C centers "on the needs of the family rather then [sic] the individual student," in contrast with the Part B preschool program, which focuses on the child. Pet. at 4. The truth is that the child is the focus of both programs, and both programs recognize the important role that parents play in developing and overseeing the program and supporting the child. Thus, for example, the parent is a member of both the IFSP and the IEP teams, and the IFSP and IEP must explain how parents are to be informed of progress (*see, e.g.*, 20 U.S.C. §§ 1414(d)(1)(A)(i)(III), 1414(d)(1)(B)(i), 1436(e)). Parent training is both a Part C early intervention service and a related service for Part B children. 20 U.S.C. § 1432(4)(E)(i) (Part C family training, counseling, and home visits), 34 C.F.R. § 300.24(b)(7) (Part B parent counseling and training).

But more to the point, the court of appeals explained why this discussion of the differences between Parts B and Part C misses the mark:

> Of course, the issue here is not whether Part C and Part B are the same; they clearly are not.

> Rather the issue is whether § 1415(j) required the AIU to include conductive education as part of Georgia's initial IEP until the agency and the parents could resolve their dispute over her IEP. That is a very different question.

Id. at 13.

The Third Circuit concluded that § 1415(j) required that the AIU continue the services in Georgia's IFSP pending the outcome of the mandated independent review processes concerning the dispute over the services proposed in AIU's IEP for Georgia. In reaching its decision, the court of appeals relied on the IDEA, on several circuit court decisions, and on this Court in *Honig v. Doe*, 484 U.S. 305 (1988). *Honig* specifically addressed § 1415(j), the "stay-put" provision, which it characterized as "unequivocal" in enjoining unilateral action by school officials (in that case the unilateral suspension of students with disabilities). 484 U.S. at 323. The decision in this case was consistent with the IDEA's provisions and purpose, and further review by this Court is not required.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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